

No. 11707

United States
Circuit Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

Transcript of Record
In Five Volumes
VOLUME V
Pages 1909 to 2262

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

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(Testimony of Tolliff Hance.)

Q. And how did you figure it on the chute?

A. I didn't figure the chute in, that is, the estimate that I made, I didn't go through and compute every structure all the way through. I computed a few typical structures and made an estimate, chiefly because of the time involved. It would take a long time to take all those 536 structures and figure up every one of them.

Q. Well, yes, I appreciate it would. As far as the chute's concerned, then, you didn't figure that at all?

A. No, I didn't make any, because I didn't figure it was representative of the job as a whole. It is a special structure, or a portion of it. You have a chance to completely wear out a well-built form, because I believe one section is repeated there about 175 or 80 times, and on the other hand, the stilling basin is a separate structure, on which you would have no re-use of forms, and for that reason there would necessarily be no correlation of the rest of the job.

Q. So your figures do not include the stilling pool, then, or the chute? [2107]

A. No, sir.

Q. And how many structures did you take to arrive at your average lumber per square foot? You said you took a few structures. How many did you take?

A. Oh, I don't have it, I didn't bring those computations with me. I think there were about eight or ten.

(Testimony of Tolliff Hance.)

Q. Now, if they were unable to re-use these forms this five times, of course that would obviously change your lumber estimate, wouldn't it?

A. That's right.

The Court: I think it is time for recess now. With reference to the witness S. R. King, who apparently is unable to attend at this time, for which we have a doctor's telegram here that it is unsafe for him to travel, I notice that the telegram in which he states that Mr. King's telegram to you, Mr. Holman, that it was necessary for him to return home because of a change in his physical condition, is dated the 27th of February.

Mr. Holman: That's right. Your Honor will recall that I asked to call him out of turn the morning following, counsel consented, and instead, he returned to Spokane that night.

The Court: Oh, he was subpoenaed originally to attend here, and was in attendance?

Mr. Holman: Yes, I subpoenaed him here, and he [2108] came voluntarily.

The Court: And his home is in Cheney, in the eastern district. I think the record should show, however, that this telegram of the 27th indicating that Mr. King had return home on account of his physical condition was not called to the Court's attention until the 17th day of March; that's correct, isn't it?

Mr. Holman: I read those telegrams to you that following morning, your Honor.

(Testimony of Tolliff Hance.)

The Court: The morning of the 28th? Will you look back through your notes, Mr. Taylor, and let me know what was the case?

Mr. Holman: Because I had the arrangement with counsel to call him that morning.

The Court: I don't recall that this telegram was called to my attention until yesterday, the 17th of March. Did you ask permission to take his deposition on the 28th of February?

Mr. Holman: Oh, no, your Honor, because he promised to return when needed. I talked with him on the 'phone and talked with him in Spokane.

The Court: When was this telegram filed?

Mr. Holman: This morning. You see, I got two on that day.

The Court: Well, I just wanted the record to show [2109] the circumstances here. I wasn't sure when the matter was brought up whether a witness could be compelled to attend within the district, if he's more than 100 miles from the place of trial, but the Rules of Civil Procedure are very explicit; rule 45, subdivision e, on page 60, provides that a witness may be compelled to attend if he's within the district or within 100 miles of the place of trial.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

(Testimony of Tolliff Hance.)

Yakima, Washington, Tuesday, March 18, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

The Court: The reporter, Mr. Taylor, has consulted his notes, Mr. Holman, and says he finds you called my attention to the telegram on the 27th. You must have received it that day.

Mr. Holman: I remember the Clerk brought me a copy.

The Court: And you called it to my attention as an explanation as to why the witness wasn't called, but didn't ask for a deposition at that time.

Mr. Holman: No. In fact, I never intended to take a deposition, and I think as the case now stands I [2110] think I'll not apply for a warrant.

The Court: I wanted to make clear that what I said about this matter before lunch was not intended to imply any criticism; I just wanted the record to be straight as to the circumstances of why he was unable to attend.

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Hance, with respect to the equipment that the Concrete Construction Company had on the job, they were showing you a picture of the Mixomobile and a picture of the Buggymobile. Now,

(Testimony of Tolliff Hance.)

as I understand, you think that equipment was not entirely applicable or practical on this type of work?

A. On such a small job, that's right.

Q. On account of it being such a small job?

A. That's right.

Q. In other words, the basis for your opinion that it is not applicable is that its capacity exceeded the needs of this job? A. Yes.

Q. What type of equipment would you say was reasonable on the job?

A. Well, you need equipment with a high degree of portability and the cost of that equipment on the job should be as low as possible consistent with pouring 1500 yards of concrete [2111] in the proposed program. For a job this size I would recommend something about like a two-sack mixer, or a small size transit mixer.

Q. You would recommend a transit mixer, would you, or a small size——

A. Well, either one. I think probably both could be applied. The operations, in my own experience, the most successful operations on this job have been used by easily moved two-sack mixers. They're relatively light, they can be towed quite readily behind a truck from one place to another, and they pour or manufacture concrete to be placed in the structure at a rate comparable with what you can put that in the structure, and it is the job of this type that usually limits the rate, rather than your mixer capacity; that is, you can't always, even

(Testimony of Tolliff Hance.)

with a two-sack mixer, keep it at capacity. You can approach it; you can exceed a one-sack mixer capacity, and for a large capacity your bottle-neck would be placing your forms. You could manufacture concrete two or three times as fast as you could place it, so you have an investment in equipment which is wasteful, and I think a two-sack mixer would probably be about the best, as far as capacity is concerned.

Q. Assuming your aggregate has to be weighed, would your two-sack still be applicable? [2112]

A. Yes. You have portable scales that can be moved easily, wheelbarrows and buggies that can be weighed, get your tare weight on them, and your scales, they manufacture them with several arms on them, you can measure a different quantity each time; and it is a relatively simple operation to weigh that, and all the equipment then that you use can be put on one flat bed truck for portability, maybe fifteen or twenty minutes after you pour a form.

Q. Where would you place your aggregate before you put it on the scale?

A. You could stock-pile it near the structures.

Q. Stock-pile it on the ground? A. Yes.

Q. By each structure?

A. That's all right, or each group of structures.

Q. In other words, you would bring your aggregate out with a truck——

A. Scatter it around.

Q. ——and dump a stock-pile on the ground; and how would you get it on the scale on the truck?

A. Wheel it up.

(Testimony of Tolliff Hance.)

Q. Shovel it up on the scales on the truck?

A. On the wheel-barrow, using a buggy or a wheel-barrow.

Q. You have your scales on a wheel-barrow?

A. No, you would have your scales on the ground, but you would be charging your mixer, a small mixer, you would be charging that, with that type of operation, you would be charging it with wheel-barrows or small two-wheel buggies.

Q. You would shovel it off the stock pile onto a wheel-barrow?

A. That's right.

Q. Wheel it onto the scales?

A. Yes.

Q. And shovel it out of the barrow into the mixer?

A. Just dump it into the mixer hopper.

Q. You think that would take less time and cost less money than to operate the Mixomobile?

A. I think so.

Q. How many men would you have on that operation?

A. Just for charging the mixer?

Q. No, for pouring the concrete under your suggested method.

A. Well, now, in order to arrive at an answer to that, we have to make assumptions as to how many sizes of aggregate you would have, you would have sand, one, one on the barrow, one on the scales, one on the mixer, and of course your placing crew out in front would depend on whether you were discharging from the mixer into the forms or whether using wheel-barrows or buggies.

(Testimony of Tolliff Hance.)

Q. That would take more men than the Mixomobile, wouldn't it? [2114]

A. That would depend on how you charged your Mixomobile. If you used batching trucks, it takes one man or two, at least one, on the batcher, and a man to drive your truck down, and one man on the mixer, and those men would not be using their time efficiently; your truck driver is a higher rate of pay than your laborer who wheels the wheelbarrow. It would take more men, but the quality of men would probably be such that the rate of pay would be less.

Q. It would take more men, but you don't think it would cost quite so much money?

A. Well, probably about the same, as far as money is concerned, of the labor.

Q. Then where would a saving occur?

A. With moving your larger mixer, you can't move large equipment as rapidly as you can small equipment; you have the same provision for pourability. Just like comparing a passenger car with a heavy truck; it's harder to maneuver and get it around. True, when you get out on a paved highway maybe both will have the same top speed, but on construction of this type, we're not working on highways.

Q. You mean to say that a truck towing this two-sack mixer would move faster on that terrain than this Mixomobile, which is self-propelled?

A. I believe it could. The particular system that I've [2115] described I've seen in operation.

(Testimony of Tolliff Hance.)

It would take about fifteen minutes after completion of pouring the structure to load all the equipment that you need on to the flat bed truck, hook the mixer on behind, and tow it down to the next structure, and depending on how far away the structure is, but where they're fairly close together, only 500 feet or so, and get set up for the next one.

Q. Well, it would take even less time for the Mixomobile to move, wouldn't it?

A. Well, they move pretty fast on good roads. I don't know about in rough going. I've never seen a Mixomobile used on this type of thing. The only thing I've seen is where you had pretty fair roads to travel on; and the matter of moving a big mixer, jockeying it into position to the forms, that takes time too.

Q. It weighs less than your transit mixer, doesn't it?

A. All depends on the size of transit mixer.

Q. Well, your ordinary size transit mixer?

A. They run all the way from one and a half to six yards.

Q. Well, say a two yard transit mixer, if you know?

A. I don't know what a two yard transit mixer would weigh, offhand.

Q. Do you know how much this Mixomobile would weigh, offhand?

A. No, I don't have figures on it. I imagine it would be fairly close to the weight of a paver. [2116]

Q. Of what?

(Testimony of Tolliff Hance.)

A. A yard paver; probably in the neighborhood of twenty thousand pounds or more.

Q. You think this Mixomobile would weigh close to twenty thousand pounds?

A. I would imagine.

Q. Empty?

A. Well, yes, probably would weigh close to that, empty.

Q. And if in fact it weighed say two tons less than that, that would affect your estimates considerably, would it not, on whether it had the maneuverability?

A. Between sixteen and twenty thousand pounds; make it sixteen thousand. It would have some effect on maneuverability; I wouldn't imagine a great deal as compared with a two ton flat bed that only weighs four thousand pounds, and the mixer behind it that travels on its own wheels.

Q. Well, on your two-sack mixer, you're going to have to put on an extra truck, is that right, to pull your two-sack mixer around?

A. Well, the same truck that carries your equipment from one hole to another, you have to have certain equipment to place your concrete, you have to have a truck for that.

Q. Well, the Mixomobile will carry your vibrator and your other equipment right along with it?

A. I don't know how much room there would be on the Mixomobile for that equipment.

Q. Ever operate a Mixomobile?

A. No, I haven't.

(Testimony of Tolliff Hance.)

Q. Ever had any experience with a Mixomobile in a job of this kind?

A. Not on a job of this kind.

Q. You're not really stating to this Court that that Mixomobile wouldn't go out there and do a good job, are you, Mr. Hance?

A. It isn't impossible to pour the concrete, no. As far as manufacturing, it will manufacture concrete as well as any other mixer..

Q. And it will go out and do this job as well as any other mixer, won't it?

A. From the standpoint of making the concrete, yes.

Q. From the standpoint of doing the whole job, going from one structure to another, and pouring the concrete, and maneuverability?

A. You asked me originally, that is, from the standpoint of practicability. The question of possibly doing a good job is one thing, with any size mixer; the practicability is something else. The practicability of cost of that equipment, if you have a heavy piece of equipment, that has a rental value of four or five hundred dollars a [2118] month, tied up on the job, as compared with a piece of equipment that has a rental value of \$150.00 a month, and you tie them up on the job the same length of time, it seems to me that is impractical on the basis it is not particularly economic.

Q. Then you're basing your opinion on the fact the Mixomobile is expensive?

A. That would be a large factor.

(Testimony of Tolliff Hance.)

Q. Well, is that the factor?

A. Yes, chiefly.

Q. Now, if you used transit mixers—or do you say that transit mixers are not advisable?

A. I think you could use a transit mixer, a small transit mixer, satisfactorily.

Q. Do you think it would be any cheaper to do the operation by transit mixers?

A. On the basis of the monthly rental, probably not. The monthly rental on transit mixers is relatively high.

Q. And it would take at least four of them to do what this one Mixomobile would do, would it not?

A. Well, I——

Q. Or do you know?

A. Well, that would have to be qualified according to the distance they had to travel.

Q. Do you know how far they had to travel out here? [2119]

A. No; I imagine it would vary according to the location of the particular structure to the stock-pile.

Q. It may well be, then, as to the nature of the information you have as to the nature of the aggregate and your distance of haul and considering your lack of experience with a Mixomobile, that this equipment Mr. Schaefer had on the job was as adaptable and as practical as any other type of equipment would have been?

A. Well, I still can't quite agree with that, on the basis of that rental value.

(Testimony of Tolliff Hance.)

Q. What do you think a Mixomobile costs?

A. I haven't been able to find any quotations on it; it isn't listed in the A.T.C. rate book that I happened to have, but the estimate, any time you get up into a mixer of that size you would probably be paying, new, for it, \$10,000.00; even possibly more; eight or ten thousand dollars.

Q. Eight to ten thousand dollars? A. Yes.

Q. And how much would a two yard transit mixer cost? A. \$4500.00, complete.

Q. \$4500.00?

A. That's right, about that. I happened to price some of those about a little over a year ago, investigating a gravel plant and a transit mixer plant in Spokane which was [2120] for sale. The man had five transit mixers, and he paid about \$2200.00 apiece for his trucks, and about \$2500.00 apiece for his mixers.

Q. Were you there when he bought them, or is that what he told you?

A. No, that was the information that I got from his books.

Q. What do they cost new?

A. That was supposed to be the new price on it.

Q. Isn't it a fact that they cost around eight or nine thousand dollars apiece, transit mixers, two yard transit mixers?

A. Well, that wasn't the information that I got from it.

Q. Well, do you know at all, Mr. Hance, outside of what you saw in somebody's books over in Spokane? A. No, I haven't investigated it.

(Testimony of Tolliff Hance.)

Q. So it is a fact, is it not, that you really are not posted on the relative cost of concrete mixing equipment, Mixomobiles or transit mixers?

A. No, not on those two particular items.

Q. Now, the Mixomobile can start right to work in the morning with the aggregate on hand and immediately start mixing concrete, can it not?

A. Yes, as far as I know.

Q. Whereas the transit mixer has to load up at the batching plant and then drive clear to the particular structure? [2121]

A. That's right.

Q. And the transit mixer has to remain at the structure until its concrete is all spilled out?

A. That's right.

Q. Whereas with the Mixomobile, the aggregate can be hauled in by truck, dumped into the Mixomobile, and emptied at once, and then the truck can go back and get some more aggregate?

A. That's right.

Q. And not be tied up?

A. That's right.

Q. And that's the reason, is it not, Mr. Hance, that one Mixomobile will pour as much concrete as four transit mixers?

A. Well, there's no question about the Mixomobile being able to pour enough concrete; that is, it can run thirty yards an hour out there, but can you use thirty yards an hour in your structures? That's the point I was trying to make.

Q. Would you say Mr. Schaefer's equipment had plenty of capacity for the job?

(Testimony of Tolliff Hance.)

A. I would say Mr. Schaefer's equipment had plenty of capacity for the job.

Q. And this little Buggymobile had plenty of maneuverability to get into the structure to pour the concrete? [2122]

A. Well, now, that Buggymobile, I've never seen one of those in operation at all.

Q. Do you know anything about the Buggymobile at all?

A. Merely what I've seen in literature, advertisements and so forth of the manufacturer, and the picture you showed me. I've never seen one of those in operation.

Q. In other words, that's new, modern, right up to date equipment, isn't it?

A. Yes, I think it's relatively new. It hasn't been in advertisement for very many years.

Q. Now, you said you measured some of the walls on the structures and found one, I think you said, was a half an inch thicker than what the plans call for?

A. That's right.

Q. Do you remember which structure that was?

A. No, not particularly that one; there was only one instance of it of a half inch. I don't recall exactly which particular structure it was among those structures that I enumerated.

Q. You measured that just at the top, did you?

A. That's right, at the top.

Q. You didn't measure it from the invert on up and take an average?

A. Well, it is hard to measure through a wall at the bottom, no. There were specifically, as I'd

(Testimony of Tolliff Hance.)

go along the wall, [2123] there would be a five inch wall, one end would be four and three quarters, the other end as much as five and three eighths. Some of them were pretty uniform all the way through; some of them were only off within an eighth of an inch, and most structures I found walls from a quarter of an inch narrow to three eighths too wide, not necessarily the same wall.

Q. And that's measured entirely on the top—

A. That's right.

Q. —of the structure? A. That's right.

Q. Now, in arriving at these depths of the structures you used the structure lay-out plan?

A. Yes, sir.

Q. Now, in order to figure the depth of a head wall, that's a very simple process, is it not, Mr. Hance?

A. Yes, sir.

Q. You simply take the elevation which is shown on the top of the wall—

A. That's right.

Q. —the elevation shown on the top of the invert, and subtract the invert from the elevation of the top of the wall?

A. That's correct.

Q. And just that one mathematical operation gives you the [2124] height of that wall, doesn't it?

A. That's right.

Q. Your figures here do not include the thickness of the concrete slab?

A. No, sir.

Q. So that your figures would all be increased by the amount of the concrete slab, as far as the depth of the excavation is concerned?

A. That's right.

(Testimony of Tolliff Hance.)

Q. Now, you indicated that these structures were from one to one and a half feet, did you say, above the surface of the ground?

A. There were some in that classification, yes.

Q. And there were others that were right flush with the ground, is that right?

A. No, the classification I gave you is the inside height of the wall. The structure may have been sitting on top of the ground, the natural ground, but that is the height of the wall of the structure.

Q. Maybe I misunderstood you. I thought you were indicating that the top of the structures, the head walls, would average one to one and a half feet above the surface of the ground.

A. No, that was the height of the head wall above the invert grade of the concrete. Now, I can't testify as to the [2125] level of the natural ground around there, because the engineers of the Bureau of Reclamation are probably the only ones that have that information. Frequently you find these structures sticking above the ground, but it varies quite a bit on the particular structure.

Q. I must have misunderstood you. You didn't intend to, and don't now testify as to any heights that the head wall of the structure extends above the surface of the ground?

A. No, sir.

Q. Now, did you say that you figured out how much it would cost to excavate all of these structure excavations by hand?

A. Yes, I made an estimate of that cost.

Q. And that was \$11,250.00?

A. That's right.

(Testimony of Tolliff Hance.)

Q. Now, how did you say you arrived at that?

A. Based on taking an hour and a half for one man to move one yard of dirt, the labor cost at one dollar per hour, and the final estimate quantity of approximately 7500 yards for common excavation.

Q. Did you take into consideration any time that would be consumed in fine grading?

A. Allowing an hour and a half should allow time for fine grading.

Q. Did you ever do any of that type of work?

A. Fine grading?

Q. No, this type of hand excavation, and fine grading, yes.

A. Yes, sir; that is, I've supervised it.

Q. Well, that's what I meant, Mr. Hance.

A. Yes.

Q. How long ago?

A. Oh, that was—I did some in 1937, and the last of it was early in 1941.

Q. Was that on this type of structures?

A. Not entirely. Part of it was, yes.

Q. Did that include head walls and curtain walls?

A. That's right; little cut-off trenches.

Q. Fillets? A. Oh, yes.

The Court: I'm not sure that I understand this witness' testimony clearly with respect to the cost figures that he gave here. Was that for the hand excavation, or for all of the excavation?

Witness: No, that's hand excavation of the entire item, whatever it is in the specifications, of excavations for structures. The basis for that was

(Testimony of Tolliff Hance.)

one contractor's operation wherein he elected to leave all the structure excavation in his ditches, and do it all by hand, rather than do it by machine. It looked at the time to me rather peculiar, but under the particular circumstances [2127] on the job it was well justified.

The Court: I still am not sure. Your figure, then, means what it would cost to do all of the excavation by hand on 1062?

A. All of that common structure excavation.

Mr. Hawkins: Does that include the fine grading too, that figure? A. That's right.

Q. (By Mr. Olson): Well, now, are you taking into consideration the laying out of the sub-grades and putting different sub-grades in each excavation?

A. No; well, there would be different sub-grades, but the actual laying out of the lines to work to, and so forth, that wouldn't be done by the laborer.

Q. Somebody else would have to be there?

A. That's right. You don't expect laborers to know how to do that. You expect to have supervisors there to stake out the work for them and tell them what is wanted, and the laborer could go ahead and dig.

Q. Well, they couldn't do that, could they, while the men were in the hole digging?

A. Well, you can't over-grade a hole; I don't quite see what you're shooting at.

Q. Well, can your lay-out man check his hubs and figure the elevations right while the men are in the hole digging out [2128] one cubic yard every hour and a half?

(Testimony of Tolliff Hance.)

A. No, they would lay a structure out ahead of the time the laborers came in to do their excavation, so when the laborers came in they would have all the information they needed to work with. You wouldn't want your laborers standing around while your supervisor was laying out the hole.

Q. And the cost of that work would be added to your \$11,250? A. That's right.

Q. Now, are you figuring work in the winter-time, when the ground is frozen? A. No.

Q. What type of weather conditions are you figuring?

A. Well, I figured at least the ground was thawed, and this type of material here would be relatively easy to move; at least the silt would be.

Q. You're figuring soft digging?

A. That's right.

Q. And what lateral clearance are you figuring?

A. I'm not figuring any.

Q. You just took final pay cubic yards?

A. That's right.

Q. Well, are you figuring that the laborers could dig just as fast if they were digging a vertical bank or a sloped bank? [2129]

A. Well, it depends; if the slope has to be trimmed and be exact as to lines and grades, it would take longer than if they didn't have to adhere to any particular slope.

Q. How were you figuring it?

A. I didn't figure they were trimming those banks to any particular slope, just whatever the material came down.

(Testimony of Tolliff Hance.)

Q. Did you figure any time spent to get the vertical neat lines, neat cuts against which the concrete would be poured without intervening form, did you figure any extra time allowance for getting that to the neat line?

A. Well, no, that's part of your fine grading, where you have to place concrete against that too. I anticipated that would be enough for fine grading too.

Q. How many of the plans did you go over in making up that estimate?

A. Well, I didn't base it on any specific number of plans. I familiarized myself with the plans going through them and taking off these head wall differences, and making calculations on those eight or ten; I considered myself sufficiently familiar with them from that, then it was merely to arrive at a reasonable estimate of what it would cost to take that out, based upon the final payment.

Q. Well, now, Mr. Hance, isn't it a fact that the greater portion of the work, the time would be consumed in forming the bottom of the excavation and the vertical cuts to [2130] grade and alignment; isn't that where the greater portion of the excavating time would be used up?

A. Well, it depends upon how many yards you have to move with respect to it. Probably—I estimated probably half and half, or maybe a little bit more on excavating than fine grading.

Q. Have you examined the model excavations here?

(Testimony of Tolliff Hance.)

A. I glanced at them one day. I haven't examined them in detail, no.

Q. Showing you page 65 of plaintiff's Exhibit 12, and calling your attention to structures 427 and 428, how much time would it take in hours, man-hours, to fine grade or to shape the base or foundation of the excavation for that structure, including the curtain walls and fillets and the vertical banks against which concrete would be poured without an intervening form, Mr. Hance?

A. Well, how close are you to—that is, how much fine grading, what depth of fine grading do you want to take there?

Q. Well, I'll ask you this: How long would it take to hand excavate that whole structure?

A. Well, I wouldn't know without making some computations as to yardage involved.

Q. Pardon?

A. I couldn't tell you without making some computations as [2131] to the yardage involved.

Q. Well, supposing you hand excavated to 3/10 off, then how long would it take to fine grade it?

A. Well, again that would involve some computation, that is, just fine grading the last three tenths, a man could possibly move a yard and a half of dirt in an hour—I mean a yard of dirt in an hour and a half, and I'd want to make some computations on it before I figured.

Q. When he first started digging how much dirt could he move in an hour and a half, without any fine grading at all?

(Testimony of Tolliff Hance.)

A. Without any fine grading a man ought to do at least a yard an hour.

Q. A yard an hour without any fine grading?

A. Yes, excavation, just soft excavation, spading at a yard an hour or maybe even more than that.

Q. Well, now, when he gets down so he's finished just plain throwing dirt, and gets cutting banks to a line, he's got to stop and find out where that line is, doesn't he? A. That's right.

Q. And that's going to take some time?

A. Well, if it is properly laid out it would take some; not much.

Q. How can a person possibly lay that out on the surface of the ground so that he knows where to put a vertical cut bank that is four or five feet down deep in the hole? [2132]

A. The common way is to set reference stakes with nails in them so a man can stretch a string between the two, and that gives him any line he's interested in on the structures. If that string is in the way he can take it out of the way until he's ready to use it again. That provides his line, and the stakes can be set sufficiently far away so he doesn't disturb them.

Q. So when he was ready to cut that neat bank he would have to go back to some stake off to the side of the hole some place in order to figure out where to put that bank, wouldn't he?

A. That's right.

Q. And that would take some time, wouldn't it?

A. Yes, a few minutes.

(Testimony of Tolliff Hance.)

Q. Well, it would take quite a little time for somebody that's just a dirt digger, shovel man?

A. Well, I don't think so; a matter of two or three minutes to stretch a string.

Q. Well, after he's strung it along on the top of the hole how would that get him down four or five feet in the ground?

A. He can go down with a plumb bob or level.

Q. Then he'd have to hold down a plumb bob or level? A. That's right.

Q. And is that the way you figured it on this?

A. That's right. That's the way I've seen it done. That's the way I've done, on crews where I had that to do.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. Mr. Hance, what would be the reasonable cost of the yard mixer type that you spoke of, not the transit? A. Of the yard mixer?

Q. Yes.

A. Just the mixer itself?

Q. Yes, that would be the two-sack.

A. Oh, you mean a two-sack mixer?

Q. The two-sack mixer that you spoke of, yes.

A. Those vary in price. We bought one at about \$1600.00, is the only one that I was familiar with the exact price. I think that there are different makes that are somewhat cheaper than that, but I can't recall the exact price. It seemed to me they're in the neighborhood of a thousand dollars.

(Testimony of Tolliff Hance.)

Q. Would you say a thousand to sixteen hundred would be a fair price?

A. They do manufacture them, I think, that cost up to two thousand dollars.

Mr. Holman: That's all.

(Whereupon, there being no further questions, the witness was excused.) [2134]

SAM MACRI

one of the defendants, recalled as a witness on behalf of the defendants Macri, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Macri, directing your attention to the operations on specification 1068——

Mr. Olson: Now, is this redirect for Mr. Macri?

Mr. Holman: No, this is in chief, on 1068.

Mr. Olson: I thought we were through with Mr. Macri.

Mr. Holman: No, sir.

The Court: Go ahead.

Q. (By Mr. Holman): Calling your attention to the two letters of November 30 and January 3, 1944 and 1945, passing between you and the Concrete Construction Company, plaintiff's Exhibits 30 and 31, the letter of November 30 directing that the work of the Concrete Construction Company begin, and the letter of January 3 notifying the Concrete Construction Company that you were taking over under the sub-contract, what, if anything, did you do with reference to preparing the job 1068

(Testimony of Sam Macri.)

for performance by the Concrete Construction Company? Between this date of November 30, 1944, and December 31, 1944, what did you do?

A. First I ordered lumber and had some lumber delivered. [2135]

Q. How much lumber, Mr. Macri, approximately?

A. Oh, approximately, around 30,000 feet.

Q. How much?

A. Around 30,000 feet; a little more, maybe.

Q. 30,000, you say? A. Yes.

Q. All right, sir, and was that delivered on the job? A. Yes.

Q. And available for making forms?

A. Yes.

Q. What, if anything, did you do with respect to excavation for structures?

A. Well, I moved the shovel over there and started digging.

Q. About when did you move the shovel over?

A. Well, the shovel went over on the job the first part of December. I think she started digging by the 11th of December.

Q. What type of shovel was that?

A. I had a 303 Koehring.

Q. Was that a hoe, or what type? A. Hoe.

Q. And what digging was the Koehring Hoe doing?

A. Well, dig the structure and pipe line.

Q. Well, was there any excavation for structures with that during the month of December? [2136]

(Testimony of Sam Macri.)

A. Oh, yes, the shovel dig quite a bit during the month of December.

Q. And were there any structure excavations ready, including fine grading, before there were any forms built?

Mr. Olson: Now, if your Honor please, his own foreman testified there was no fine grading done until February 5, the man that he hired to do it.

The Court: Well, he isn't bound by any particular witness.

Mr. Holman: No.

A. There was quite a bit dug by shovel, but as far as fine grade is concerned, it was not done until February.

Q. Now what, if anything, was done by the Concrete Construction Company toward placing forms or otherwise proceeding to place concrete on 1068 between the date of November 30, 1944, and December 31, 1944? A. None.

Q. How do you know that?

A. Well, I was over there, myself.

Q. Did they go on to the job, did Concrete Construction Company go on to the job at all, Mr. Macri? A. Not to do any work.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. When did you get your notice to proceed on 1068? [2137]

A. Well, the notice to proceed, customarily the government give it about thirty days after you sign it.

(Testimony of Sam Macri.)

Q. No, that's not what I asked you. When did you get your letter or notice from the Bureau of Reclamation to proceed with 1068?

A. Well, they give us 30 days time.

Q. Do you have the letter, Mr. Macri,? Do you have it here in your files, or does your counsel have it?

A. I don't know whether Mr. Holman has it.

Mr. Holman: No, but I can give you the proceed date.

Mr. Olson: I'll get it. May I have the original file?

Mr. Holman: I'd say it was a June or July date.

Q. (By Mr. Olson): Where is the notice that you got to proceed, from the government, where is that notice on 1068?

A. I think we got him in the file.

Q. In your file where?

A. I can't say if it is here or in Seattle. That I can produce, I guess.

Q. You left that in Seattle?

A. I can't say now if I have it here or in Seattle.

Q. Did you see the complaint that was started on your behalf and in your name down in Oregon?

A. The what? [2138]

Q. The complaint, the lawsuit, the papers that were started for you in Oregon on 1068?

A. Well, it was prepared by the attorney.

Q. Did you see it?

A. I think I signed some paper, but I never read anything.

Q. Well, I'm reading from paragraph 7 of the complaint which was a part of your pleadings in

(Testimony of Sam Macri.)

this case, entitled in the Circuit Court of the State of Oregon for the County of Multnomah, Sam Macri, Joe Macri and Don Macri, a copartnership doing business under the assumed name and style of Macri and Company vs. M. C. Schaefer, a sole trader, doing business under the assumed name and style of Concrete Construction Company, reading from paragraph 7: "That on the first day of July, 1944, the plaintiffs received official notice to proceed with its said contract, and did in fact proceed with and commence performance of said contract shortly before receipt of said official notice, on or about the 28th day of June, 1944." Now is that date correct that you received the notice to proceed on 1068 from the Bureau of Reclamation, on July 1, 1944?

A. If the Bureau send it, must be correct.

Q. Well, Mr. Macri, you're the one that received it. Now, is that right or is it not right?

A. I think it's right. [2139]

Q. That's about the time you got it, about July 1?

A. Every time we sign a contract they give us notice to proceed, right after we sign the contract.

Q. And you didn't start any work on 1068 until December, you said you moved the shovel down there?

A. Just the structures; we started to do some work long before that.

Q. What kind of work did you start doing down there? A. The open canal.

Q. The open canal? A. Yes.

(Testimony of Sam Macri.)

Q. But as far as Mr. Schaefer's work was concerned, you started in on December 11, you said.

A. Yes, sir.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. Well, on December 11, at the time that you started in excavating for structures, what was Mr. Schaefer's crew and equipment doing?

A. Well, they was working 1068 then—I mean 1062.

Q. They were then working on 1062; had they yet completed 1062?

A. No, they wasn't completed then.

Recross-Examination

By Mr. Olson:

Q. You weren't through with 1062 yet either, were you, Mr. Macri? [2140]

Mr. Holman: That's objected to as immaterial.

The Court: Overruled.

A. Well, I have to wait until they pour concrete, so we can back fill and finish up.

Q. You weren't through excavating on 1062 either, was you?

A. I think there was some there.

Mr. Olson: That's all.

Mr. Holman: That's all.

(Whereupon, there being no further questions, the witness was excused.)

ELIZABETH CALLAHAN

a witness called on behalf of the defendants Macri,
resumed the stand and testified further as follows:

(Whereupon, copies of checks and vouchers
Macri to Schaefer were marked defendant
Macri's Exhibit No. 99 for identification.

(Whereupon, copies of checks and vouchers
Macri payments on specification 1062 on behalf
of Schaefer were marked defendant Macri's
Exhibit No. 100 for identification.)

Direct Examination

By Mr. Holman:

Q. Now, handing you—well, for the purpose of
the record, your Honor, I'm not sure that it's clear,
Miss Callahan, I believe you testified before, your
employment; what is your employment? [2141]

A. General office work.

Q. For whom? A. Mr. Macri.

Q. And did you at my direction secure from the
records of Macri and Company the various carbon
copies of the voucher checks which were transmitted
to the Concrete Construction Company?

A. Yes, sir.

Q. Handing you what is marked Macri's 99 for
identification, will you tell me whether or not that
is a complete set of the voucher checks or not, for
the payments?

A. Well, there are two checks that didn't have
vouchers.

Q. This is the rest of them? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. Now, directing your attention to each one of these by number, for brevity, number 1012 of September 29, 1944, number 488 of November 7, 1944, number 521 of November 22, 1944, number 523 of December 27, 1944, number 804 of February 8, 1945, and number 946 of February 26, 1945, were the originals of those checks paid and cancelled and returned to you? A. They were.

Q. Do you have those? A. I do.

Mr. Holman: I offer 99 in evidence, your Honor, for the [2142] purpose of establishing the transactions as between Macri and Company and the use plaintiff, with respect to the estimated quantities of the work throughout the periods I have indicated from these respective carbons of the checks in question.

Mr. Olson: Your Honor, this is a duplicate exhibit. Counsel has already put in the originals of the vouchers, as I understand it.

Mr. Holman: Well, the only difference is this is the check also, your Honor; it is the carbon with the check.

The Court: Is this a duplicate of another exhibit here?

Mr. Holman: Well, I haven't checked against these yellow ones, your Honor. I don't know whether they are the same or not.

The Court: Well, it will be admitted as additional data here on the vouchers that are not on the checks.

(Testimony of Elizabeth Callahan.)

Mr. Olson: The vouchers are the ones that are in; that's what they did put in before, was the data on the vouchers.

The Court: Let's see, I haven't checked through these, but does this latter identification 99 include all these vouchers in 76, with the checks attached to them?

Mr. Holman: I haven't checked against 76, your Honor, [2143] because counsel says that's all he had, and I just haven't checked it.

The Court: My thought is there is enough documentary proof here, the record is voluminous enough as it is. If they're the same, why not withdraw 76 and put this in in place of it, if there is no objection on the ground it is a copy.

Mr. Olson: That would be all right.

Mr. Holman: I would like to check against the other.

The Court: Well, the latter will be admitted.

(Whereupon, defendant Macri's Exhibit No. 99 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Now, handing you what has been marked Macri's identification 100, calling your attention to the dates there, number 2151; September 10, 1945; number 1723, July 28, 1945; number 1740 of July 28, 1945; number 2148 of September 10, 1945;

(Testimony of Elizabeth Callahan.)

number 2149 of September 10, 1945; and number 2150 of September 10, 1945, will you tell me whether or not the checks as shown by those vouchers were currently cashed and paid? A. Yes, they were.

Q. And what is the explanation with reference to all of those checks, being in the months of July and September, 1945, [2144] Miss Callahan? What are they for?

A. Well, they're payment of garnishments and levies by their creditors made against us, and the amounts we paid out at their direction.

Q. I offer in evidence, your Honor, and for the same purpose, Macri's 100; and by the way, Miss Callahan, I notice that number 2151 for \$1639.96 is shown payable to our firm as attorneys for L. Colucio; do you know whether that was a re-payment or a payment through us to the surety in that case?

A. We were directed, I believe it was——

Mr. Olson: Just a minute; I object to any direction somebody gave you. I think this evidence is all immaterial. We've stipulated as to the amount paid. If you're going to offer these then we've got to check every one of them. There's no question as to the amount paid.

The Court: As I understand, counsel's purpose of this is to show progress of the work by payments made at various times on these estimates.

Mr. Holman: That's right.

Mr. Olson: Well, these payments were made long after the job was completed and we had gone back to Portland.

(Testimony of Elizabeth Callahan.)

Mr. Holman: That's true, but they're [2145] still payments and showing what they are and in connection with this job.

Mr. Olson: We'd like to check your vouchers, then.

Mr. Holman: Well, that's all right. There's one to me for \$1600.00 and one for some \$10.00, but I'll show you I didn't get the money.

Mr. Olson: You mean the check wasn't cashed?

Mr. Holman: May I expedite with the witness, your Honor? I want her to get some other papers here.

The Court: Yes.

Mr. Holman: Would you now, Miss Callahan, from the files you have locate the lumber bills pertaining to lumber on 1062?

The Court: She can be finding those while Mr. Olson is checking over these vouchers.

Q. (By Mr. Holman): Miss Callahan, have you at my direction made a compilation of the lumber with respect to the bills, as shown for delivery?

A. I have.

Q. Would you step here and indicate which it is, please?

A. One is made up more in detail. One is by yard and one is by month.

Q. Very well. [2146]

(Whereupon, list of lumber furnished to 1062 by months was marked defendant Macri's Exhibit No. 101 for identification.)

(Testimony of Elizabeth Callahan.)

(Whereupon, list of lumber furnished to 1062, showing source, was marked defendant Macri's Exhibit No. 102 for identification.)

Q. (By Mr. Holman): Handing you what has been marked Macri's identification 101, what is that computation, Miss Callahan?

A. That is the lumber delivered to specification 1062, by the month.

Q: And what is Macri's identification 102?

A. It's a little more in detail on the lumber delivered to 1062, as to size, by yard.

Q. Now, with reference to Macri's identification 101, can you indicate from that compilation and the bills you have the quantity of lumber that was delivered to 1062 in the month of March, 1944?

Mr. Olson: That's objected to, your Honor, as not being the best evidence.

The Court: Is she testifying from the books, or from her own compilation?

Witness: From the bills.

Mr. Holman: From the bills, your Honor. In other words, if counsel wants me to take each bill, I'm ready to do it, but that would be interminable. If your Honor [2147] desires that, I can go right through the bills, a stack of bills. This is a compilation from those bills.

The Court: The bills from which the compilation is made are available?

Mr. Holman: Yes, right here.

(Testimony of Elizabeth Callahan.)

Mr. Olson: My point is, how does Miss Callahan know what lumber was delivered to 1062? I have no objection to the compilation.

Q. (By Mr. Holman): What source do you have, Miss Callahan, for knowing the lumber was delivered to those jobs, or that job?

A. I have the statement bills and packing slips signed by the men on the job. In some cases they're Macri and Company men, and in some cases they're Concrete Construction men.

Mr. Olson: That still doesn't show that they have any connection with our job. They had a lot of work over here.

Q. Do they show the place of delivery, Miss Callahan?

A. You mean the delivery receipts?

Q. Yes, with respect to whether it is Sunnyside or Prosser job.

A. Well, of course, at the time some of these were made the Prosser job was not in progress, but they tell by the man who signed for them, you can tell what payroll he's on, [2148] and is charged to that job through the books; I don't know as I exactly understand.

Mr. Holman: I had in mind, your Honor, that this would be a matter of cross-examination as to any particular item counsel is concerned with. I merely wanted the job quantity as shown by our books and records.

The Court: Well, if the original records here, or books, or whatever she has, show an allocation

(Testimony of Elizabeth Callahan.)

of the lumber to 1062, either directly or indirectly, so that she can ascertain that, then it seems to me that a compilation made by her would be admissible if the original material from which it is made is available.

Mr. Holman: I have it here.

The Court: On the theory that the originals are voluminous and bulky.

Mr. Holman: That's my purpose.

The Court: If counsel then desires to go into it on cross-examination, the originals will be available. Of course, I don't feel like suggesting how you proceed here, but couldn't her compilations be admitted in evidence?

Mr. Holman: That's what I wanted to do, your Honor.

Q. (By Mr. Holman): Then will you tell me, please, what is the function of 102 as against 101? I believe you said 101 [2149] was by months. Now, what is 102?

A. By company, and it's more in detail as to size; also it's easier to check that with the bills.

The Court: By company, you mean the company from which it was purchased?

A. Yes; source.

Mr. Holman: I offer in evidence 101 and 102. The bills are available upon which they are based. My purpose, your Honor, is not a cost item, but a quantity item of lumber; that's the sole purpose.

The Court: Yes, I understand that. I'm not sure that I understand yet, was Miss Callahan dur-

(Testimony of Elizabeth Callahan.)

ing this period involved in charge of the books and accounts of Mr. Macri's office?

Q. What is your answer? At the time these were current were you in charge of the bookkeeping?

A. No. I got this information from the files and books.

The Court: Well, Miss Callahan is at this time in charge of Mr. Macri's office?

Mr. Holman: Yes, sir.

The Court: I see; all right.

Q. And you have under my directions made these compilations? A. Yes.

Mr. Olson: While they're checking those lumber things I can take up these checks that counsel has offered. [2150] We object to their introduction, your Honor, on the ground that it has been agreed between counsel at pre-trial hearing as to the amount of money that was paid on this job, and received by us, and for which they are credited, so that there's no longer any issue as to the payments. The exhibits, therefore, cannot be offered for the purpose of proving that fact, because the amount is admitted. Now, the checks which are offered here, being Macri's identification 100, are none of them made payable to ourselves, but payable to all different payees; they have self-serving matters on the voucher form of the check, and if they are to be offered they will necessitate our going into a collateral matter of getting the authorizations, if they be charged to us, a written authorization from us, and I'm not just being facetious about it, your

(Testimony of Elizabeth Callahan.)

Honor. The check on top here seems to go to L. Collucio, or seems to go to Brethorst, Fowler, Holman and Dewar for \$1639.96, and says it is a claim against Concrete Construction Company to L. Collucio, whereas the letter I have gives the amount as \$1564.66. As I say, there isn't any dispute as to the amount paid. If we're going to go into these it's going to necessitate going into our authorization of payment, and I don't know for what purpose.

Mr. Holman: The only purpose of these, as I stated [2151] at the time I offered them, is to show that currently, as of these dates, there were still transactions pertaining to the Concrete Construction Company and paid under their order, regardless of the amounts. I'm not interested in the amounts at all, because counsel is exactly right; the pre-trial determined the net balance.

The Court: Well, so far as amounts are concerned and the aggregate amount that may be shown by any of these check vouchers put in here, it is my view that the agreement reached in the pre-trial conference and embodied in the pre-trial order is binding on all the parties here, and that they would be limited by that figure agreed upon, regardless of what the proof now is here, so far as payment is concerned. The only thing I'm concerned with is whether these vouchers might be admissible for some other purpose than to show the amount paid by Macri for Schaefer.

(Testimony of Elizabeth Callahan.)

Mr. Olson: The amount isn't the same as our authorization.

Mr. Holman: It is immaterial.

Mr. Olson: It isn't to us.

Q. (By Mr. Holman): In that connection, Miss Callahan, do you have a copy of the letter setting forth these deductions, addressed to Concrete Construction Company?

A. Yes, I can explain that, if it is allowable.

The Court: I'll overrule the objection and let them in for the limited purpose of showing the transactions at this time.

(Whereupon, defendant Macri's Exhibit No. 100 for identification was admitted in evidence.)

Direct Examination
(Continued)

By Mr. Holman:

Q. Do you have a copy of a letter that was transmitted to Concrete Construction Company showing these payments?

A. Yes; not in this file, though.

Q. Do you have that here? A. Yes.

Q. Could you get that, please?

(Whereupon, copy letter Macri to Schaefer, September 10, 1945, was marked defendant Macri's Exhibit No. 103 for identification.)

Mr. Holman: Counsel, do you have the original with you of the letter of September 10, 1945?

(Testimony of Elizabeth Callahan.)

Mr. Olson: I don't know; I haven't the slightest idea.

Q. (By Mr. Holman): Handing you what has been marked Macri's identification 103, can you tell me whether or not that is a true and correct copy of the transmittal as of September 10, 1945, that was sent to the Concrete Construction Company? A. That's right. [2153]

Q. Did you send it, Miss Callahan?

A. I did.

Mr. Holman: I offer that in evidence, your Honor. This is not the carbon, but it is a copy of it, and for the same purpose, your Honor; not for the purpose of fixing figures at all.

Mr. Olson: We object to this letter, defendant Macri's identification 103, your Honor, on the ground that it's a compilation of self-serving figures, it's not the best evidence, doesn't even purport to be a carbon copy of the communication, and it's not material to prove any issue in this case.

The Court: Well, I'll have to see it before I can rule on it, I think.

Mr. Holman: I didn't intend it as a carbon copy.

Mr. Hawkins: Do you have another copy of that, Miss Callahan? I haven't seen it yet.

Witness: Yes, I made some extra copies, because my typewriter won't make that many carbons.

The Court: I confess I'm getting lost here. I thought these check vouchers were coming in because they had some bearing on the progress of the work, to show there had been delay in the execution of it.

(Testimony of Elizabeth Callahan.)

Mr. Holman: My only purpose, your Honor, of each of these exhibits, as I have said, is not to cover figures, [2154] but to establish that they were current transactions between the parties upon definite information which is contrary to the second cause of action that the use plaintiff asserts. It is the only purpose of it.

The Court: Oh, I see.

Mr. Holman: In other words, may it please the Court, I very definitely understand, I am sure everyone does, that we had a pre-trial and fixed figures, but these are evidences of transactions between the parties, that's all.

The Court: I get your point. In other words, it is your point that there couldn't have been a superseding of the written contract; at least this is still dealing with reference to the sub-contract.

Mr. Olson: Your Honor, this is certainly not the best evidence.

Mr. Holman: No, it is not. If they raise that, I call for the original from their file.

Mr. Olson: We haven't got it; apparently never had it. I've never seen that.

Mr. Holman: In view of that I withdraw it.

The Court: I think if you show the letter was written to Mr. Schaefer you can produce a carbon copy of it.

Mr. Holman: I just had that typed for convenience [2155] and for each of the counsel. Can you find the carbon? Do you have that with you, Miss Callahan?

(Testimony of Elizabeth Callahan.)

Witness: Well, I'm not sure I can tell which one is the carbon, because you asked me to make some extra copies for the court, and I made a lot of extra copies, and now I can't tell which is which.

Mr. Holman: Well, I'll withdraw that identification, your Honor, unless I can identify it.

The Court: It is time for the mid-afternoon recess. I'll recess for ten minutes, and perhaps you can find the carbon.

(Short recess.)

(All parties present as before and the trial was resumed.)

Mr. Holman: Your Honor, may I have the bills and the orders marked as sub-numbers of an identification, by the Clerk, and then I have no objection to counsel checking them.

(Whereupon, Folder of bills and invoices for lumber on 1062 was marked defendant Macri's Exhibit No. 104 for identification.)

Mr. Holman: Then can you give them sub-numbers?

The Clerk: Yes.

Q. (By Mr. Holman): During the recess, Miss Callahan, did you find the carbon of the letter that was submitted to the [2156] Concrete Construction Company? A. I did.

Q. Dated September 10, 1945? A. Yes.

(Testimony of Elizabeth Callahan.)

(Whereupon, carbon copy letter Macri to Schaefer September 10, 1945, was marked defendant Macri's Exhibit No. 105 for identification.)

Mr. Holman: May the record show I am withdrawing Macri's identification 103, your Honor, and substituting Macri's 105.

The Court: Yes. All right, do you renew your offer of this?

Mr. Holman: Yes, I do, your Honor.

Mr. Olson: Now, if your Honor please, we object to the introduction of Macri's 105 on the ground and for the reason that it is a copy, it is not the best evidence, no notice to produce was ever served upon the use plaintiff, Concrete Construction Company, to produce the original of this letter, no showing that we ever received the original of this letter, and we find no copy of it, and my client says that he knows nothing of it, so to permit the introduction of a copy without the groundwork being laid is highly prejudicial to us, and upon the further ground that it supports no issue in the case as understood by me, it contains a lot of self-serving figures and documents, [2157] and is highly prejudicial to the plaintiff's case to permit it to go in.

Mr. Holman: Your Honor, I'm ready to concede, if counsel says that he did not receive the original of that, that this copy at this time is not the best evidence; it is all the evidence I have, and that's the reason I make the offer, and again I want

(Testimony of Elizabeth Callahan.)

to assure counsel that I make it for the purpose solely of showing that on September 10, 1945—showing the negotiations between the use plaintiff and Macri and Company regarding the payments of the bills under the contract. I'm not interested in the figures at all.

The Court: There isn't any evidence that it was mailed?

Mr. Holman: Other than Miss Callahan's statement that it was mailed; she so testified.

The Court: Oh, you testified it was mailed? I'll overrule the objection and admit it for the limited purpose of showing transactions between the parties, showing dealing with reference to that date with reference to that sub-contract, specification 1062. As I understand it, the testimony of mailing of a letter and production of a copy is only presumptive evidence, and may be rebutted.

Mr. Holman: That is presumptive evidence of it [2158] being received, that's right, your Honor.

(Whereupon, defendant Macri's Exhibit No. 105 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Holman:

Q. With reference to Macri's 101 you state that it is what?

A. It is a summary by month of the lumber delivered to specification 1062.

(Testimony of Elizabeth Callahan.)

Q. And the detail of that is in the exhibit for identification 104 that's being marked?

A. Yes.

Q. And then 102 is what?

A. It is a further breakdown by source or by yard.

Q. By lumber yard? A. That's right.

Q. And the supporting data on that is in identification 104? A. In that folder, yes.

Mr. Holman: I renew the offer, your Honor, making the copies available for counsel.

The Court: Has counsel seen those?

Mr. Holman: Yes, he's had these, your Honor.

Mr. Olson: I have seen the identifications 101 and 102, your Honor. I haven't seen any of the supporting documents as yet.

Mr. Hawkins: These are both recapitulations?

Mr. Holman: That's right. [2159]

Mr. Olson: Our chief objection, your Honor, to those identifications is that I assume they are offered for the purpose of showing that the lumber was delivered to 1062 on those dates——

Mr. Holman: Right.

Mr. Olson: ——and that's a matter that cannot be within Miss Callahan's knowledge, or that cannot be gleaned from any documents in their file, it seems to me.

The Court: As I understand it, Miss Callahan was not in Mr. Macri's employ or wasn't in his office at the time that this lumber was purchased and delivered; that's true, isn't it?

(Testimony of Elizabeth Callahan.)

Mr. Holman: That's correct, your Honor.

The Court: I can't see from examining these original bills how one who didn't have personal knowledge could tell that this lumber was furnished on this job over here, on 1062. It seems to me that in the face of counsel's objection here, that there must be some further identification as to where this lumber went, whether it was actually used on this job, or delivered here.

Mr. Holman: I recognize that difficulty, your Honor.

The Court: I can't see anything on the original bills except possibly where it was delivered, in some instances, at Sunnyside. The bills go to Mr. Macri's office in Seattle. If there is any method of identification there I'd like to have it pointed out. In other words, how can Miss Callahan say that this lumber was delivered to this 1062 job?

Mr. Holman: Will you answer as far as you can on that, Miss Callahan?

Witness: Yes; they're signed for, the slips or statements, in the first place, these first ones you're looking at are Sunnyside, and these names, as you go through, well, the men working on the job, in some instances Macri's men, in some instances Concrete Construction Company, they signed the receipt for delivery; then those in turn are mailed in to the main office for payment.

Q. (By Mr. Holman): How do you find that those are the men, Miss Callahan? How do you identify the men?

(Testimony of Elizabeth Callahan.)

A. Because they're on the payroll during that time for that job, and of course the bills in the main office are filed by job.

Q. Those were filed for that job?

A. That's right.

Mr. Holman: That's the only proof that I can make through this witness, your Honor, on that.

The Court: Well, I'll overrule the objections and admit them in evidence.

(Whereupon, defendant Macri's [2161] Exhibit No. 101 for identification was admitted in evidence.)

(Whereupon, defendant Macri's Exhibit No. 102 for identification was admitted in evidence.)

Q. (By Mr. Holman): Now, with reference to Exhibit 101, will you please tell the quantity of lumber supported by file 104, identification 104, that was delivered in the month of March?

A. March, 1944?

Q. Yes.

A. 22,523 board feet; 2016 square feet of plywood.

Q. That 2016 square feet applies to plywood, you say?

A. Yes.

Q. Now, in the month of April?

A. April, 1944; 9942 board feet; 800 square feet.

Q. And going on through each month, Miss Callahan, for the purpose of the record only, is the amount shown ahead of BF lumber in each instance

(Testimony of Elizabeth Callahan.)

for the various amounts, instead of detailing them through, below each month, is a——

A. It is totalled.

Q. Yes; now I notice you have May; you have for May how much? A. 456 board feet.

Q. Yes; and then the next you don't indicate the month, but you have out there "7-44," on the side. [2162] A. That's July.

Q. And then the next month, "9-44," what is that? A. September, '44.

Q. Then the other dates down the side, what do those refer to?

A. October, November, December.

Q. Yes, but where you have given specific dates, what do they refer to, the bill, or the date of delivery, or what? A. Date of delivery.

Q. And your total at the end, for all of the months from March, 1944, through February, 1945, is how much?

A. 116,355 board feet; 3456 square feet.

Q. And then taking Macri's Exhibit 102, the first page is what? What is the purpose of it?

A. Well, the first page with the exception of one item is lumber purchased from Potlatch yards.

Q. From the Potlatch Yard?

A. At Sunnyside.

Q. And then taking the second page, what is the purpose of that page; what does it show?

A. It shows in each case where the lumber came from.

(Testimony of Elizabeth Callahan.)

Q. Now, taking the first one, Sequim Lumber Company, where is Sequim Lumber Company?

A. In Sequim.

Q. What State? [2163] A. Washington.

Q. And the next one, lumber hauled to Concrete Construction Company, specification 1062, from specification 1068, by G.M.C. truck Number 18, Macri and Company truck, how is that information obtained?

A. There are some slips in the file showing that they took some lumber in that truck from 1068 to 1062, and it shows the amounts and dates.

Q. Then the next item, lumber shipped from Stadium Home Project in August, and billed to 1062 August 28, where is the supporting data on that?

A. There is a bill in the folder from Stadium Homes to Macri, and then there are individual delivery slips in there, some signed, and I've forgotten the driver's name.

Q. Will those individual slips show the date of receipt, or not?

A. Yes, they show the dates of delivery.

Q. Then the additional item, lumber sent from Stadium Homes Project, purchased from Pope & Talbot, sent to specification 1062——

A. That is some lumber that there is a bill for that they bought from Pope & Talbot, and they did some work on it, I think, at Stadium Homes, and then sent it to 1062.

Q. Did some what?

A. I think it says "ripping." [2164]

(Testimony of Elizabeth Callahan.)

Q. And then the last page, lumber delivered to specification 1062, Roza Project, from Walton Lumber Company, Everett, Washington, where are those bills?

A. They are in the folder, and that was delivered direct to the job.

Q. Lumber delivered to specification 1068 by Totem Lumber Company, and hauled by Hamilton Trucking Service, is that in there?

A. I do not have the bill for that item, only the trucking bill, showing the lumber hauled.

Q. Did you get that quantity off the trucking bill?

A. Yes, the quantity is there, and also showing that Mr. Stickney signed for it.

Q. Now, are the totals shown by this Exhibit 102 the same as the totals for 101, the same quantities of lumber? A. Yes.

Mr. Olson: You say they are the same totals on those two exhibits?

A. Should be.

Q. (By Mr. Holman): Counsel asked you if they were, Miss Callahan.

A. There is a breakdown, I think, between board feet and square feet. I think you will find the complete total is the same.

Q. Yes, I'm referring to 116,355 board feet and 3056 square [2165] feet; in other words, 102 has no additional or other lumber than is shown in 101, is that right, Miss Callahan?

A. That's right.

(Testimony of Elizabeth Callahan.)

Q. Now, with reference to job 1068, Miss Callahan, have you made a compilation of the expenditures on that job made by Macri and Company?

A. Yes.

Q. Will you come here and get that, please? With reference to specification 1068, Miss Callahan, have you at my direction made a compilation of all of the expenditures involved? A. Yes.

Q. With respect to items 12 and the other items covered by the sub-contract with the use plaintiff?

A. Yes.

Q. Do you have one with you, Miss Callahan?

A. Yes.

The Clerk: It is number 91.

Q. Handing you what has been marked Macri's identification 91, is the first item of labor an item of all the labor or the labor upon the items covered by the sub-contract only?

A. Labor on the items covered by the sub-contract.

Q. And that amount is what?

Mr. Olson: Just a minute. If the Court [2166] please, we object to reading into the record the figures off of this identification, which is not in evidence, and further object to any testimony as to the costs of any items on 1068, upon the grounds first, that it isn't the cost to Macri that's material, but it would be the reasonable cost in any event, and further, your Honor, that there is no testimony in this case upon which to predicate any claim for damages against Mr. Schaefer on 1068. The testi-

(Testimony of Elizabeth Callahan.)

mony still is that there was no fine grading, no holes fine graded, up until February, 1945, upon which the Concrete Construction Company could have placed forms or poured concrete, and the evidence is further that prior to that time Macri and Company took over the form work and unlawfully took over the contract, to the exclusion of the Concrete Construction Company.

The Court: Well, that's one of the issues in this case, of course, as to whose fault it was that there was a breach of 1068 and it wasn't performed by Schaefer. I don't see how I could decide the case or pass upon these questions piece-meal. It is still an issue in the case, and I think that evidence is admissible on the question of damages on Mr. Macri's theory on 1068. Now, frankly, I'm not sure what the measure of damages would be, whether it would be the difference between the bid price and what it cost Mr. Macri, or the [2167] difference between the bid price and the fair and reasonable cost of completing the contract, but it certainly seems to me that it could be connected up, as we did in the Schaefer case, by showing that what Macri's costs were were the reasonable value, and if counsel proposes to connect it up in that way it would be admissible on either theory.

Mr. Hawkins: I have the further objection, the same as I did to Mr. Hendershott's Exhibit, that this compilation is according to testimony prepared from records in the hands of Mr. Macri's office manager at the time these records were prepared,

(Testimony of Elizabeth Callahan.)

and we don't have here the party who actually prepared those basic records, to cross-examine him as to where he obtained the information, and as to the reliability of that information which he used in preparing those basic records, and for that reason I think that the exhibit is not admissible. It is of necessity based upon hearsay, and is merely a recordation of what somebody told the bookkeeper at that time, and can have no probative force in this Court whatsoever. The point that we're trying to get at here is apparently the cost to Macri of his performance of 1068, and it seems to me that this compilation is not competent to prove that; it is based necessarily upon hearsay, and it is clearly not the best evidence of what those costs [2168] were. I'm inclined to join with counsel Olson in that.

The Court: The only way Mr. Macri could show his costs would be by his books. No one would expect him to remember, certainly, what he spent on the job. I'm assuming he could bring his books, there might be a small truck-load of them, and show his costs, and I think it would be admissible.

Mr. Hawkins: If they're properly identified.

The Court: Yes, if they're properly identified as his books. I think the fact he may not have the same bookkeeper now wouldn't deprive him of making his proof. I haven't seen the records on which this is based, of course. I don't know what they show.

Mr. Holman: If your Honor will harken back to this identification yesterday, the details of how

(Testimony of Elizabeth Callahan.)

the source from which these various points, these various numbered items, came, was in the record, other than the amounts, by way of identification yesterday. Now, then, where are the basic books of the charges that are shown on this identification?

Witness: Well, the basic charges of 1068 are all in the books. I was there all during this job.

Q. (By Mr. Holman): Yes, I understood that yesterday; and you made the entries?

A. Some of the original entries are mine, and some are the [2169] auditor's.

Q. Well, they were made under your direction, were they?

A. Yes, I was there during this time.

The Court: I was laboring under a misapprehension. I understood Miss Callahan wasn't in the office part of this time, but she was, during the performance of 1068?

Q. Yes, but not during 1062. Do you have the original books here so that if counsel wants to refer to them they can be referred to?

A. Yes.

Mr. Holman: They're here. At least I've carted them around a lot.

Mr. Hawkins: Well, just to explain my position here, it is the same position I took when Mr. Hendershott was here; what happens is Mr. Macri has an office in Seattle where he keeps his books of account, so he knows where he stands. The book-keeper takes information she obtains in this way; the foreman makes a payroll, sends it to her, she

(Testimony of Elizabeth Callahan.)

takes the data and enters into this ledger; likewise with the lumber: She takes bills sent in from the field and prepares her books from that information furnished her. Now, it has always been my thought or my opinion that you cannot introduce books of account into evidence unless the people that actually furnished the information on which they were made up are [2170] here in court to verify the statements that the books purport to make. In other words, you would have to have the foreman here to testify that he sent that information, and that it was correct, and the bookkeeper to testify that she obtained this information from this foreman, and that these books correctly reflect that information furnished to her by the foreman. I don't see how it can be competently proved otherwise. Otherwise it is simply based upon hearsay and would be self-serving.

The Court: If that's the rule in large and extensive transactions it would be impossible to prove anything by the books. You couldn't bring in over a period of two or three years an army of employees to verify the item.

Mr. Hawkins: I think that would undoubtedly be true. That is my position.

The Court: I get your position all right.

Q. (By Mr. Holman): I have here the cancelled checks; these are the supporting checks, are they not?

A. That is correct.

Mr. Holman: And we have the original records and we have the various receipted bills or state-

(Testimony of Elizabeth Callahan.)

ments involved here for these items, your Honor, and they can be made available, although there are a bunch of checks here. [2171]

The Court: Well, I think that under the circumstances the compilation of Miss Callahan is admissible. I don't know which one is before the Court now. Have you made an offer of one of them here?

Q. (By Mr. Holman): Do you have it, Miss Callahan? A. Yes.

The Court: We were just talking about one item there.

Mr. Holman: Yes, the first item, payroll.

The Court: I think perhaps counsel's objection that she shouldn't read from the compilation until it is admitted is well taken.

Mr. Holman: Well, I'll offer the compilation, then, making available the supporting documents and records.

The Court: I don't know that counsel have seen this before; have they?

Mr. Holman: I furnished them each a copy yesterday, your Honor.

Mr. Hawkins: I believe we've seen them. It is our position that there has to be supporting testimony for each one of these items. It is in the nature of an accounting and seeking to recover a specified amount of damages. I don't see how they can prove their damages by a blanket compilation.

Mr. Holman: I rather challenge the position taken [2172] by the defendants Philp and Goerig

(Testimony of Elizabeth Callahan.)

and their counsel, in view of the fact under any possible contention it couldn't be asserted against them. This is for recovery in favor of Macri against the use plaintiffs, and therefore I just don't see how——

Mr. Hawkins: If you'll stipulate that this has no bearing on your controversy with Philp and Goerig, I have no objection.

Mr. Holman: Well, I can't so stipulate.

The Court: I assume this wouldn't show whether or not Macri lost anything on the whole job; this is the part that would have been or was subcontracted to Schaefer, is that correct?

Mr. Holman: That's correct.

The Court: He may have made money on the whole contract and lost it on Schaefer, but it does have a bearing, I can see, here. The Court will permit you to object if you wish, and have your objection shown in the record. So far as the method of procedure is concerned here, I'll leave that to counsel's discretion. I think this compilation may be shown, where the records upon which it is based are available and it is testified it is made by this witness. If counsel wishes to, have her go over it item by item.

Mr. Holman: I think if it were [2173] introduced in evidence then I would go over the items so it would be in the record, showing where she gets the supporting document.

The Court: The method to which I am accustomed, and it is used a great deal in these P.U.D.

(Testimony of Elizabeth Callahan.)

cases, is to have the compilation admitted, and then go over it item by item and explain it. Are you offering this now?

Mr. Holman: I am.

The Court: Have the objections been made, now?

Mr. Olson: I would like to have the record show that the objections I made to the previous questions asked are now made as to the exhibit.

The Court: The record may show, as to both counsel; unless you wish to withdraw them, the objections as previously made as to both counsel will stand. The objections will be overruled, and it is admitted.

(Whereupon, defendant Macri's Exhibit No. 91 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Holman:

Q. With reference, then, to the first item, "Labor, November 22, 1944, to November 15, 1945, Inc."; that's inclusive, is it not? A. Right.

Q. You got that item from what source?

A. From the payroll. [2174]

Q. And that is what amount?

A. \$49,323.62.

Q. Then with respect to item 2, the payroll taxes you yesterday detailed, what was that amount?

A. \$2,219.56.

(Testimony of Elizabeth Callahan.)

Q. And the next item of \$51,543.18 is what?

A. Rental of equipment from H. H. Walker.

Q. No; the next item, \$51,543.18, shown on that compilation, what is it?

Well, that's not an item; that's a total.

Q. Of what? A. Of 1 and 2.

Q. Then the next item, rental of equipment, H. H. Walker, Inc., comes from what?

A. From these bills from H. H. Walker.

Q. And the amount of that? A. \$4,708.33.

Q. Then the next item, rental of equipment of Macri and Company, and the figures were derived how?

A. They are derived from the O.P.A. book, which prices prevailed at that time.

Q. And what's the total of those?

A. \$2,920.00.

Q. The next item, 5, the amount is what?

A. \$8,750.00. [2175]

Q. And I believe you testified yesterday you had a source for that; what was your source?

A. That's Martin & Sons sub-contract price.

Q. Do you have that in the file?

A. Yes, I do.

Q. Item 6 is what? A. \$571.56.

Q. And what do you have in the file on that?

A. Potlatch yard bills; it is for nails, wire, and miscellaneous small material.

Q. Then for each of the other items down to and including item 11, what is your supporting data for that?

A. I have the bills and cancelled checks.

(Testimony of Elizabeth Callahan.)

A. And what are those; will you call the figures?

A. Item 7, Seattle Steel Company, \$1,191.68, part rental and part purchase.

Q. Item 8, Ropes, Inc.; wire? A. \$109.57.

Q. That's purchase.

A. Item for Yakima Hardware Company, wire and miscellaneous, \$86.60; that's purchase. Pioneer Sand and Gravel Company, Sealcure and freight, \$679.76, purchase and freight; Northwest Engineering Company, rental, \$781.21, rental.

Q. Now, with respect to item 12, what was your supporting data on that? [2176]

A. Ray Shingshang, cancelled pay vouchers, pay checks.

Q. Item 13, what's your supporting data on that?

A. I have the bills and cancelled checks.

Q. That's how much? A. \$259.20.

Q. Then the total of the items expended that you've detailed is how much? A. \$72,759.98.

Q. The next item, sub-contract price on quantities of Bureau final estimate number 16, how do you arrive at that item, Miss Callahan?

A. Well, number 12—oh, you mean all of it?

Q. Pardon me?

A. Do you mean all of it?

Q. No; how do you arrive at that item of \$43,135.17?

A. Well, the detail is down below, the sub-contract price and the final quantities on the final estimate 16.

(Testimony of Elizabeth Callahan.)

Q. Then when these numbers are shown, number 12, what does that number refer to?

A. That's item 12 on the Bureau of Reclamation estimate.

Q. And it is taken from number 16 each time, the final estimate, is it? A. That's right.

Q. And number 13 is item 13?

A. That's right. [2177]

Q. 15 and 16 the same way?

A. That's right.

Q. Are those the amounts received by Macri & Company at the sub-contract prices in the sub-contract entered into between Macri and Company and M. C. Schaefer, Concrete Construction Company, these prices that you carried, \$28.00; 2 cents per pound; \$35.00; and 3 cents per pound?

A. They are the sub-contract prices, yes.

Q. Now, deducting the amount of the sub-contract prices for the quantities shown by those items in the final estimate left a balance of how much expenditure over the amount covered by the sub-contract items? A. \$29,624.81.

Mr. Holman: You may inquire.

Mr. Olson: Your Honor, in order to intelligently examine Miss Callahan on the exhibits put in on lumber, it is going to require some examination of those vouchers that have been introduced. I'm wondering if counsel hasn't got a witness he can proceed with so that Miss Callahan will be subject to cross-examination on that in the morning?

Mr. Holman: Is your Honor going until 4:30 tonight, or 4?

(Testimony of Elizabeth Callahan.)

The Court: I had planned to go until 4:30.

Mr. Holman: Well, except for this witness, your [2178] Honor, and possibly one more, I'm through with my case.

Mr. Olson: Have you got any other witness ready to go on?

Mr. Holman: No, I think not.

The Court: If you're that near closing, I have no objection to adjourning. I assume it will take a day to argue this case. I wanted to be sure and get through this week.

Mr. Olson: I wonder if Mr. Hawkins and Mr. Ivy have anything?

Mr. Hawkins: The only thing I have to offer is the assignment which is in the hands of the Clerk. The only materiality with respect to that assignment is with respect to the issues drawn between Macri on the one hand and Goerig and Philp on the other. If I recall correctly Mr. Holman stipulated that if DeWolf Henry sent a letter with the copy of the assignment stating it was a copy, that that could be admitted, and that is here, has been since the 28th of February, and I'll offer that in evidence at this time.

The Court: Well, I don't know that that would be in order now unless counsel has no objection to it, but what I'm trying to ascertain now is the probable duration of the trial here.

Mr. Hawkins: That's the only evidence I [2179] have to offer in this case.

The Court: Do you have any evidence to offer?

Mr. Ivy: No, we haven't, your Honor.

(Testimony of Elizabeth Callahan.)

The Court: And how long will your rebuttal take?

Mr. Olson: About a day, your Honor. Do I understand that counsel expects to be through about noon tomorrow?

Mr. Holman: I think so. This detailed information is virtually the end of my case.

The Court: Well, I appreciate the fact that it would be difficult to cross-examine here unless you have some general matters you might want to cross-examine on.

Mr. Olson: The only thing the witness has testified to, your Honor, is this lumber and accounting, and both of them are based on some detailed documents that I would like, particularly the lumber records, to look at. I could ask a couple of questions.

Mr. Holman: May I pass up a copy of our trial brief? I have served counsel. It came in this afternoon, finally typed.

Cross-Examination

By Mr. Olson:

Q. Miss Callahan, when did you first go to work for Mr. Macri?

A. The last of November in '44.

Q. November, 1944? [2180]

A. Toward the latter part.

Q. And you're still working for him?

A. That's right.

Q. Now, showing you defendant Macri's Exhibit 105, do you state, Miss Callahan, that you

(Testimony of Elizabeth Callahan.)

actually remember of having mailed that to the Concrete Construction Company, the original of that letter? A. Yes, I do.

Q. What is there that brings to your mind the mailing of it?

A. Because it's a corrected statement of this one of July 10. After I had mailed the statement of July 10 there were some additional garnishment amounts came in, I guess; for instance, on the Collucio matter there was a court cost and then there was interest on tax, and I believe there was one other charge at Sunnyside, sixty-one dollars and something, so it was necessary for me to make a corrected statement and send it in in order to add those statements.

Q. That would bring to your mind the making of that statement, but what is there that recalls to your mind the depositing of them in the mail box?

A. I don't usually drop them in the mail box. I put them in my mail basket, and when the mail man comes around he picks them up. [2181]

Q. Do you remember the mail man picking that up?

A. It was September 10—do I remember the mail man picking up that particular envelope?

Q. That's what I want to know.

A. I'm afraid I don't.

Q. The only thing you have to say is you remember making it up for that purpose?

(Testimony of Elizabeth Callahan.)

A. Well, the same way that I mail any of my mail. I know it was mailed; I don't know it got there.

Q. Well, how do you know that letter was mailed?

A. Because I mail my mail every day.

Q. I thought you said you put it in a box or basket and the mail man picked it up?

A. That's the same as mailing it.

Q. Right there in the office? A. Yes.

Q. You didn't deposit it in the United States mail deposit?

A. I gave it to the United States mail carrier.

Q. Did you hand it to him?

A. I hand it to him every day.

Q. And you have no particular recollection as far as this letter is concerned, Exhibit 105, do you, Miss Callahan?

A. You mean that individual letter?

Q. Yes. A. No. [2182]

Q. Now, handing you Maeri's identification 104, that identification, as I understand it, has all of the detail from which you made up compilations 101 and 102? A. That's right.

Q. Now, your compilation 101 shows what total board feet of lumber?

A. It shows a separation, and now you're asking for the——

Q. On the total, on the end, yes.

A. That's what I'm talking about; that there is a separation of the square feet and board feet.

(Testimony of Elizabeth Callahan.)

Q. Well, what board feet, first.

A. On this one it is 116,355.

Q. And on 102 you show how many board feet?

A. 117,155.

Q. And on 101 you show how many square feet?

A. 3456.

Q. 3456? A. Yes.

Q. And on 102 you show how many square feet?

A. 2656.

Q. 2656? A. That's right.

Q. And on 102 that figure square feet is shown as plywood; 102 is the one that I have in my hand, shown as plywood? A. That's right. [2183]

Q. And that is plywood, is it?

A. I believe it is; it was explained to me that plywood was figured in square feet, not board feet.

Q. Well, I say, that figure is plywood, is it not?

A. I believe it is.

Q. And on 101, the other exhibit, is the item there shown as square feet, under total, is that likewise plywood?

A. I'm not sure about that. In one place on the bill it is marked square feet, but it doesn't say it is square feet of plywood.

Q. You're not able, then, are you, Miss Callahan, to explain why the totals on the two exhibits 101 and 102 are not the same, either as to square feet or board feet?

A. I believe the over-all is the same.

Q. Upon what do you base that?

A. Base what?

(Testimony of Elizabeth Callahan.)

Q. That the over-all total is the same; what do you mean by that?

A. Well, it is a question of whether you're going to separate square feet and board feet.

Q. Well, can you do that?

A. I can only indicate it from what is on the bills.

Q. Then you don't know whether the over-all total is the same or not? A. Yes. [2184]

Q. Is it? A. I believe it is.

Q. How many square feet in a board foot?

A. I'm not testifying as to that. I'm testifying to what is written on the bills. I'm not a lumber expert.

Q. Why don't the totals on the two exhibits total the same?

A. Because of that item that is marked square feet.

The Court: Which one do you have there?

A. 102. This 640 is marked square feet, and it doesn't say whether it is plywood, or whether it is just square feet.

Q. You say it is marked square feet. It is marked that way on what? A. On the invoice.

Q. On the invoice; well, did you make up 101 and 102 from the same invoices? A. Yes.

Q. So that you had the same invoices exactly in making up 101 as you did in making up 102?

A. No, I made up 101 from the detail sheet 102; it's merely made up by the month.

(Testimony of Elizabeth Callahan.)

Q. Well, now, why don't the totals, why aren't they the same?

A. Well, I would gather that I made a mistake.

Q. Well, are you able to say where the mistake is?

A. Yes, I think I can show you. Right here. I believe it [2185] is in this 640 square feet that is not designated as to plywood or what kind of wood.

Q. Are you referring to——

A. Well, I think I have added one of the square feet in the board feet. It looks like it.

Q. Well, it appears, then, that these compilations, 102 and 101, one or the other, or perhaps both, are not an accurate representation of the material contained in the invoices which you now hold, isn't that so?

A. I think you will find they will coincide with the invoices as to amounts and sizes.

Q. You think each of these will coincide with the invoices on hand, even though they arrive at different totals?

A. It is possible there is a mistake on the total.

Q. Now, have you got the invoices to support the item that you show in November, 1944, of 14,688 board feet from the Walton Lumber Company?

A. What is the date?

Q. November, 1944.

A. Yes. Does it give the invoice number? Yes.

Q. May I see it please?

A. 14,688 feet; that's what you're asking about, is it not?

(Testimony of Elizabeth Callahan.)

Q. Yes, the items shown on November, 1944.

A. That's invoice 1452.

Q. The invoice which you have handed me you have charged to [2186] job 1062, have you not, Miss Callahan?

A. Yes.

Q. They say on the top, sold to Burnsted & McCarthy?

A. That's right.

Q. Now, is it not a fact that Burnsted & McCarthy were on job 1068, and not 1062?

A. They did ordering for both jobs.

Q. I say, isn't it a fact that Burnsted & McCarthy were working on job 1068?

A. They were on that job; as to what their duties were, you would have to clarify that with Mr. Macri; I don't know.

Q. And we would have to clarify with Mr. Macri where this lumber went to, would we not? Both of them show "Sold to Burnsted & McCarthy, Prosser, Washington."

A. I believe it is signed for by a Concrete Construction Company employee, John Klugg.

Q. Well, do you know whose writing this is?

A. Which one.

Q. The one you just mentioned, John Klugg, Concrete Construction Company?

A. I presume it's his handwriting.

Q. Well, do you know it is his writing?

A. I don't know that it is or isn't; it says "Received by John Klugg."

Q. Who wrote that? [2187]

A. I suppose he did. This other writing is Mr. Burnsteds.

(Testimony of Elizabeth Callahan.)

Q. In other words, you don't know anything about where this lumber went except what appears on this document, do you, Miss Callahan?

A. That's right, and where it is charged to.

Q. For all you know personally, other than what appears on this document, that lumber could well have gone on 1068?

A. I don't believe so. We paid the bills on 1062.

Q. I say, as far as you know, Miss Callahan, other than what appears on the face of these two documents, these invoices dated November, 1944, showing it is sold to Burnsted & McCarthy, except for what is shown on there, that lumber may have all gone into 1068, as far as you personally know; I'm not asking you what you believe.

A. No, I was told to charge it to 1062.

Q. Well, then, except for what you were told by somebody else, and what appears on the face of these two invoices, that lumber may have well gone into 1068, as far as you personally know?

A. As far as charging it to the job, I only know what is written on it, and what I was instructed to do.

Q. You don't know whether this lumber was delivered to 1062?

A. Except for the packing slip.

Q. Were you working for the Macri Company on November 18, 1944? [2188]

A. Right about that time I went to work.

Q. About the 18th?

A. Right around in there; I couldn't tell you the exact date. It was the latter part.

(Testimony of Elizabeth Callahan.)

Q. And you don't know whether John Klugg worked for Mr. Macri on 1068 or not?

A. He worked for Concrete Construction Company, didn't he?

Q. I say, do you know whether or not he worked for Mr. Macri on 1068, or not?

A. I don't believe he's on our payroll.

Mr. Olson: Your Honor, I would like to have an opportunity to go through these, on the rest of them.

The Court: Very well. I want to direct counsel's attention to these two exhibits that seem to be duplicated in part, that is, Macri's 99 and Macri's 76, and the Clerk's check indicates to him that the vouchers in 76 are the same as the copies shown in 99. Now, if you wish to withdraw one of these, Mr. Holman, after checking them, you may do so. The Court will adjourn until tomorrow morning at 9:30.

(Whereupon, the Court took a recess in this cause until Wednesday, March 19, 1947, at 9:30 o'clock a.m.)

Yakima, Washington, Wednesday, March 19, 1947
9:30 o'Clock A.M.

(All parties present as before, and the trial was [2189] resumed.)

Mr. Holman: Your Honor, I have checked Macri's 76 and Macri's Exhibit 99, and I find on 76 the originals are true originals of the carbons on 99.

(Testimony of Elizabeth Callahan.)

Now, I've forgotten which way your Honor suggested substituting. This part is duplicate, and the upper part is check.

The Court: I think, then, the one that has both on it should be retained.

Mr. Holman: Then I'll withdraw 76 and return it to counsel, as it is from their file.

The Court: All right.

Mr. Olson: Your Honor please, I have served counsel for all parties with our brief, and including a supplemental brief; in other words, our brief and supplemental to the brief will be in the file simultaneously and I would like to hand your Honor, then, our memorandum of authorities.

The Court: All right.

Cross-Examination

(Continued)

By Mr. Olson:

Q. Miss Callahan, I'll hand you Macri's identification 104 again. Now, would you look at 104-58, you will notice on each one there is a small number. Do you find that one? A. Yes.

Q. Now, that exhibit shows the material was sold to whom? A. It says Burnsted & McCarthy.

Q. And at what address?

A. 712 North 49th Street, it says here.

Q. Now, the slip attached to that bears what signature? A. I don't know; I can't read it.

Q. Well, it is R. Kirk, isn't it?

A. I don't know whether it is a K or B; I can't read it.

(Testimony of Elizabeth Callahan.)

Q. You didn't find that name on the payroll of 1062, did you, on either Macri's payroll or Schaefer's payroll?

A. I would have to look. I don't remember every man on the payroll.

Q. What I want to know, Miss Callahan, is just how and by what notation on any of that particular identification it was that made you include it on the list of lumber submitted to 1062.

A. Well, of course, the packing slip is marked Roza Project, but these slips were given to me by Mr. Burnsted, who was ordering and expediting lumber, and there is writing, "Charge 1062."

Q. And the reason you charged it to 1062 is because Mr. Burnsted told you to?

A. Because Mr. Burnsted had marked it.

Q. Yes, because Mr. Burnsted wrote in pencil on the face of the exhibit "Charge to 1062, schedule 1."

A. Mr. Burnsted went over these bills with me.

Q. Just a minute; I'm not asking what Mr. Burnsted did. I [2191] say, the reason you charged to 1062 was because Mr. Burnsted wrote that notation "Charge Sunnyside number 1, 1062"?

A. In addition to the fact that he told me to.

Q. And the fact that he told you to?

A. Yes.

Q. All right. Yes, now, what does that show as to the destination, still referring to 58 on the face of the bill that you made up your compilation, exhibits 102 and 101 from, what destination is shown on Exhibit 104-58?

A. Prosser.

(Testimony of Elizabeth Callahan.)

Q. Prosser, Washington. And that is the address of 1068, is it not? A. That's right.

Q. And the address of 1062 was Sunnyside, Washington; right? A. That's right.

The Court: How much lumber was in that one, that 58?

Q. According to the—well, how much lumber does that include, Miss Callahan?

A. 12,217 feet.

Q. Now, your item number 72, 104-72, would you get that one, please? Now, that's billed to whom? A. Burnsted & McCarthy. [2192]

Q. At what address? A. Prosser.

Q. Prosser, Washington. It says "Destination, Prosser, Washington," does it?

A. No, it says "address."

Q. Address, Prosser, Washington, and that address is the address of 1068, is it not?

A. That's right.

Q. And Burnsted & McCarthy had charge of 1068 for you, did they not?

Mr. Holman: Just a minute. Your Honor, objected to as not proper cross-examination.

The Court: Overruled.

A. They were over there.

Q. Yes. A. Mr. Burnsted ordered lumber.

Q. Now, that covers how much lumber?

A. 14,688.

Q. Now can you find number 2? A. Yes.

Q. Do you have that, Miss Callahan?

A. Yes.

(Testimony of Elizabeth Callahan.)

Q. Now, what lumber does that include?

A. What kind, you mean?

Q. What lumber does it include; what quantity?
42 board [2193] feet, is it not?

A. That's right.

Q. And it consists of one piece of lumber 3 by
12 by 14, is that right?

A. There's another figure here, to.

Q. Well, that invoice you charged to 1062, did
you not? A. Yes.

Q. I don't think the reporter can hear you, nor
anybody else, Miss Callahan.

A. Yes, it says "Sunnyside, Washington."

Q. It says "Sunnyside, Washington" on it?

A. That's right.

Q. And for that reason you charged it to 1062.
You made no effort, did you, Miss Callahan, to
ascertain whether or not that lumber was used for
forms or whether it was used for other jobs on
1062 by Macri and Company?

A. I don't think I understand your question.

Q. I say, in making up this compilation, 102
and 101, you simply were endeavoring from these
invoices and what Mr. Burnsted told you to list
all of the lumber that went to 1062, irrespective
of the purpose for which it was to be used?

A. No, that isn't exactly right. I checked this
with Mr. Macri also. I know we didn't get all the
lumber, but it is all the lumber that I could find
slips for. [2194]

(Testimony of Elizabeth Callahan.)

Q. Well, that 3 by 12 by 14, did you ascertain that that piece of lumber three inches thick, twelve inches wide, and fourteen feet long was used in making forms for concrete structures?

A. I wouldn't remember that particular piece of lumber.

Q. Well, did you make any effort to ascertain whether or not the lumber that you have shown on this compilation is form lumber? That's what I'm trying to get at.

A. No; I was asked to record the lumber that was delivered to 1062.

Q. And your compilation of 102 and 101 includes not only the information from those invoices, but also is the result of oral instructions and information given to you by both Mr. Macri and by Mr. Burnsted, true? A. The bills are here.

The Court: Read the question. See if you can't answer the questions.

A. I was instructed by them, corrected and checked, yes.

Q. Is your answer to my last question yes, Miss Callahan?

A. Yes, I received oral instructions.

Q. And the exhibits 101 and 102 includes information which you received orally from Mr. Burnsted and Mr. Macri?

A. Well, I find that rather hard to answer.

Q. Well, you made up 101 and 102, did you not? A. Yes, I did. [2195]

(Testimony of Elizabeth Callahan.)

Q. Now, in making it up, did you rely in addition to the invoices which you now hold, 104, on information which was given to you orally by Mr. Macri and Mr. Burnsted? A. Yes, some of it.

Q. Yes. Now, can you find number 6, 104-6? A. 104-6.

Q. Now, that is 206 board feet? A. Yes.

Q. And what notation is there on the bill itself to indicate that that is chargeable to 1062?

A. It is signed for by Mr. Staples; is that what you mean?

Q. Is that what you relied on, the fact that it was signed for by Mr. Staples?

A. In addition to the fact these bills were all filed under 1062.

Q. You didn't ascertain, did you, Miss Callahan, that that lumber was form lumber on 1062?

A. I didn't know whether it was form lumber or not.

Q. You wouldn't be able to say whether or not that lumber was purchased for the building of Macri's office on the yard?

A. I wouldn't know that.

Q. All right; now would you find number 10?

A. Yes.

Q. Do you have that? [2196] A. Yes.

Q. Now, you say that there was 360 and 96 board feet delivered, do you not, in your compilation 101, based on those numbers? A. Yes.

Q. You show it under dates of May 18 and May 31. Actually it's all shown on the one invoice, is it not, dated May 18? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. In other words, there is no invoice to support the May 31 date which you show on your compilation, 101 and 102, but they are in fact both shown on the invoice for May 18, 1944; that's correct is it not? A. This one says May 31.

Q. Well, that's not a charge, though, is it? That's not a delivery. A. No.

Q. On your exhibit 101 and 102 you show 360 board feet on May 18, and 96 board feet on May 31, is that not so, Miss Callahan? A. Yes.

Q. And as a matter of fact, those two items are both shown on an invoice dated May 18?

A. That's right.

Q. Now, go to your May 31 invoice there, and what does it [2197] show? A. It is a credit.

Q. Of how many feet; how many board feet of lumber? A. 380.

Q. Now, where do you show that credit on 101 and 102? A. I don't.

Mr. Holman: What is that sub-number?

Q. What is the sub-number of the memorandum credit? A. 104-12.

Q. 104-12. So that in your compilation, then, Miss Callahan, it is a fact, is it not, that you show delivered to 1062 360 board feet and 96 board feet, or a total of 456 board feet, whereas your actual files from which you've made up this compilation show that 380 feet of that lumber was credited back?

A. It shows as being delivered; it should show as being credited.

(Testimony of Elizabeth Callahan.)

Q. And your compilation does not show that credit, does it? A. That's right.

Q. Now, on your number 18, would you find that? A. Yes.

Q. That is 320 board feet of two by eight, right? Or it includes 320 board feet of two by eight?

A. Yes.

Q. And also includes 304 board feet of two by six? [2198] A. Yes.

Q. That again is lumber used for building forms on 1062, is it, Miss Callahan, or do you know? A. I wouldn't know form lumber.

Q. It also includes, the same exhibit, does it not, Miss Callahan, includes 53 board feet consisting of one piece of lumber, which is four by eight?

A. That 20 feet long, is that what you mean?

Q. Well, do you have a four by eight there, 53 board feet? A. Yes, I think that's 53.

Q. You charged that on your compilation to this 1062, also, did you not?

A. Yes; it was delivered to 1062.

Q. Matter of fact, you charged all the lumber shown on that slip there to 1062, did you not?

A. Well, let's see. Yes, that's lumber Mr. Ashley ordered.

Q. That's lumber Mr. Ashley got?

A. Yes.

Q. All right. Now, can you find your number 21? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. And that consists of a four by eight and a three by ten, does it not? A. Right.

Q. Signed for by whom? A. Sheffield.

Q. Curtis Sheffield? A. C. H. Sheffield.

Q. He was the one that they testified to was the fine grader, or did you hear that testimony?

A. I don't know about that.

Q. Did you check him on your payroll, or do you recall? A. I don't recall that.

Q. All right. Let's see, that was 88 board feet altogether, was it not? A. Yes.

Q. Now, check your item 26. What piece of lumber does that include?

A. That includes 24 pieces.

Q. Of what? A. Two by six.

Q. Two by six? A. Yes.

Q. No one have signed for that lumber, have they? A. No.

Q. What was there to indicate to you upon looking at that slip that it went to 1062 and not 1068? How did you ascertain that?

A. It was charged to 1062 on the books.

Q. There's nothing on the invoice to indicate where that lumber went to, is there? [2200]

A. Not on this slip.

Q. It's not signed by anybody; simply shows that it was purchased in Sunnyside?

A. That's right.

Q. And that's how many board feet?

A. I don't know; I'd have to figure that out. 384, it would be.

(Testimony of Elizabeth Callahan.)

Q. Did you reduce that bill to board feet yourself in making your compilation?

A. I did not.

Q. Where did you get your 384 board feet when you figured that up?

A. I got a man to do it for me.

Q. I see, so in making your compilation, then, 101 and 102, as far as those items are concerned, you took that bill, had somebody else reduce it to board feet, and then you put his figure on your compilation?

A. That's right.

Q. And each time where the board feet was not shown on the bill that's what you did?

A. That's right.

Q. Now, will you get your item number 32?

A. Yes.

Q. That takes in 570 board feet, consisting of 21 pieces of two by ten? [2201]

A. Right.

Q. And what is there to indicate that that went to 1062, as far as the bill is concerned?

A. It was OK'd by Stickney.

Q. May I see where his name appears there? That is the W.E.S.?

A. M.E.S.

Q. Or M.E.S.?

A. That's right.

Q. You don't know, again, what that lumber was used for, do you, Miss Callahan?

A. No.

Q. Now, would you get your number 47?

A. Yes.

Q. The invoice on that is from whom?

A. Sequim Lumber and Supply Company.

Q. And its charged to whom?

A. Macri and Company.

(Testimony of Elizabeth Callahan.)

Q. At what address?

A. Well, it is a carload of lumber that's charged on the bill here by railroad spur.

Q. And where was that delivered, if you can tell from that bill?

A. It is lumber that came from Macri Development Company.

Q. It was delivered to the Macri Development Company in [2202] Seattle, then? A. Yes.

Q. And then you have charged in your compilation certain portions of that bill to 1062, have you not? A. Yes.

Q. And from whence did you get the information that directed you to charge the portion of it which you did to 1062?

A. Well, it is a book entry on the Macri Development books; "charge to Sunnyside."

Q. And who made the book entry?

A. The auditor.

Q. And where did he get the information?

A. From the files and bills.

Q. What is there, by looking at the—I'm referring to 104-47, to indicate where that lumber went, other than to the Macri Development Company?

A. This slip that's attached to it.

Q. No, I'm asking you on 47.

A. They're all part of 47, are they not?

Q. On the pink one upon which the number 47 is written in ink, what is there on that slip to indicate what part of that lumber went to 1062?

(Testimony of Elizabeth Callahan.)

A. There's nothing on that slip; that's why this is attached to it.

Mr. Holman: Just a minute; may it please the Court, [2203] she has a right to finish her answer.

The Court: Read the question and answer.

(Whereupon, the reporter read the last previous question and answer.)

The Court: That's an answer to the question, Miss Callahan. Answer counsel's questions, and then if there are explanations to make, you can leave it to Mr. Holman to bring out the explanations. Just answer the questions directly.

Q. (By Mr. Olson): Now, the portion you refer to as being attached is a white slip and a yellow slip, right? A. Yes.

Q. And those are pencil notations?

A. That's right.

Q. And who made those?

A. Whoever worked in that office at the time.

Q. You don't know who made them?

A. I didn't work in that office at the time.

Q. You don't know where they got the information to make up the pencilled notations? You don't know where they got that information?

A. No.

Q. Whether somebody told it to them or where it came from? A. No. It is part of the file.

Q. And when you made up your compilation, 101 and 102, you [2204] then charged and placed on that compilation that portion of the lumber shown

(Testimony of Elizabeth Callahan.)

on the pink invoice 104-47 indicated in pencil on the attached yellow and white notations, did you not?

A. That part of it that's charged to Sunnyside, yes.

Q. And that's where you got your information?

A. That's right.

The Court: What is the quantity charged to 1062 on that?

Q. Can you tell from that notation the quantity that was charged; by looking at the invoice can you tell, Miss Callahan?

A. No, part of it is in square feet and part of it is in board feet. There is 9900 board feet, and 800 square feet.

Q. Now, look at your identifications or your numbers 104-49 and 104-50.

A. Yes.

Q. Now, whose notation is that?

A. Mr. Burnsted.

Q. Mr. Burnsted; and those two identifications are the source of your information in compiling 101 and 102 and showing lumber from 1068 to 1062, is that what that is?

A. Yes.

Q. And you know nothing about that except what Mr. Burnsted wrote on those two slips of paper? [2205]

A. That's right.

Q. Did he make both pencil and the green crayon notations?

A. No, the pencil notations are the truck driver's; the green crayon, Mr. Burnsted's.

Q. When did Mr. Burnsted make the green crayon notations?

(Testimony of Elizabeth Callahan.)

A. I don't know; he brought me these slips from Prosser when he came.

Q. Isn't it a fact that Mr. Burnsted went over those bills afterwards and made these pencil notations to charge one here and one someplace else?

A. No, that's not true. He brought them to me in this manner.

The Court: What's the quantity on those two?

Q. What is the quantity, Miss Callahan, shown on those two? A. There's 640 square feet.

The Court: 640, did you say?

A. Square feet. I'll have to add the board feet. 2790 board feet.

Mr. Olson: Your Honor, I should like to offer those identifications into evidence.

Mr. Holman: I join, your Honor.

The Court: Beg pardon?

Mr. Holman: I have no objection to 104 being admitted in its entirety. [2206]

The Court: I'm not clear as to whether counsel's offer refers to all of 104, or just the sub-numbers that you have taken up.

Mr. Olson: I'm offering the sub-numbers that I have taken up, your Honor.

The Court: In cross-examination?

Mr. Olson: Yes.

The Court: Well, now, let's see. Have you got those, or any way of checking with me on the numbers?

Mr. Olson: Yes, I have them, your honor. 104-58, 104-72, 104-2, 104-6, 10, 18, 21——

(Testimony of Elizabeth Callahan.)

The Court: I had 12 there, 104-12. Didn't you have that one too?

Mr. Olson: Oh, that's correct, I do want 12.

The Court: 104-10, and the next is 104-12.

Mr. Olson: Then 18—I'm just reading the sub-numbers, 21, 26, 32, 47, 49, 50.

The Court: That tallies with my notation of them.

Mr. Holman: Your Honor, I would like to offer the whole of the file, so it cannot be torn apart. Counsel went over the file.

The Court: Well, I think if part of it is to go in, probably all of it should. The whole of 104 will be admitted, then.

(Whereupon, defendant Macri's [2207] Exhibit No. 104 for identification was admitted in evidence.)

Cross-Examination (Continued)

By Mr. Olson:

Q. Now, do you have a copy of Exhibit 91, that's your compilation of the costs of 1068, Miss Callahan? A. Yes.

Q. And by the way, did you happen to get my copy of that? A. No, I don't think so.

Q. Well, Miss Callahan, in figuring up your labor item, number 1, that was made up from the certified payroll which was identified here in evidence, is that correct? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. And your payroll taxes, your item 2, is a mathematical computation based upon item 1?

A. Yes.

Q. Well, does your item 1 figure, forty nine odd thousand dollars, is that a net amount paid to the men, or is that the gross payment?

A. That's the gross payment.

Q. Well, now, I notice in item 2 you've included your old age benefit taxes, federal unemployment, state unemployment, and the Workman's Act; was any of that deducted from the men?

A. This represents the employer's portion.

Q. Well, then, none of that was deducted from the men, of [2208] item 2?

A. No, not if I understand you correctly. There are deductions, but this represents the employer's payment.

Q. Now, item 3, the rental of equipment from H. H. Walker and Company, do you have the vouchers on that?

A. Yes, I do.

Q. Where are they? Do you have them?

A. Yes, I do.

Q. May I have them, please?

A. Do you mind if I take my checks out?

Q. I'd rather they be left all together.

Mr. Holman: Well, then, let's leave them the way they are and have them marked for sub-numbers.

Mr. Olson: We're willing to examine them right here in court, in the presence of counsel.

Mr. Holman: I'm perfectly willing that counsel examine them.

(Testimony of Elizabeth Callahan.)

Mr. Olson: It won't do a great deal of good for me to examine them. I'd like to have Mr. Hendershott do it.

Mr. Holman: Then I'd like them marked as sub-numbers.

Mr. Olson: I'll set it right here, and counsel can have them marked if he wishes. As I understand, that item 3, Miss Callahan, represents actual money paid out [2209] as shown by the invoices which you've just now handed me, to H. H. Walker, Inc.?

A. There is still an outstanding balance on Mr. Walker; is that what you're referring to?

Q. (By Mr. Olson): In other words, it's not yet all paid? A. That's right.

Q. But what I'm getting at is, you've been billed for that amount, is that right?

A. That's right.

Q. That's not figured on O.P.A. rentals, but is figured on actual bill?

A. Oh, it is actual bill from them. I think they're O.P.A. prices, all right.

Q. Now, on item 4—

Mr. Holman: Pardon me just a minute, counsel. May I have this marked for identification?

(Whereupon, folder of bills, checks, etc., on item 3, specification 1068. was marked defendant Macri's Exhibit No. 106 for identification.)

Q. (By Mr. Olson): Miss Callahan, your item 4, rental of equipment owned by Macri and Company, that figure is not a book item of Macri's books, as I understand it? A. Is not a book item?

(Testimony of Elizabeth Callahan.)

Q. You did not get that off of Mr. Macri's books any place, but got it out of an O.P.A. book? [2210]

A. Well, the prices are out of the O.P.A. book.

Q. Well, that's where you got the entire item 4, isn't it, as far as the amounts are concerned?

A. No, it was given to me by Mr. Burnsted, which is part of the equipment charged to concrete work.

Q. Did Mr. Burnsted give you these figures, \$2000.00 on a long wheel base flat bed truck?

A. No, he gave me the equipment and I put down the figures.

Q. So I'm asking you, then, as far as the figures are concerned, they didn't come out of Mr. Macri's books, but came out of an O.P.A. book?

A. Well, that was made up a long time ago, and it is in Mr. Macri's books; is that what you mean?

Q. You mean that figure does appear in Mr. Macri's books, then, \$2000.00? A. Yes.

Q. Do you have that book with you?

A. Yes, I believe we have. I'm not sure.

Q. Would you produce that, please?

A. I don't have the books here in the courtroom; is that what you mean?

Q. I understood you said yesterday when this Exhibit 91 was admitted that the books and records from which the same was made were here available for our inspection. You said that, didn't you, Miss Callahan? [2211]

A. I said they could be produced.

Mr. Holman: They're over at the hotel. I can send for them if necessary, Mr. Olson.

(Testimony of Elizabeth Callahan.)

Q. We would like to check that item. Did you get the figure out of the O.P.A. book yourself, or did someone else do that?

A. I was trying to think—I think Mr. Mackel helped me with that.

Q. Who? A. Mr. Mackel, our accountant.

Q. Is he here? A. No.

Q. He was here, wasn't he?

A. Yes, he was.

Q. Well, is he the one that got those figures, then?

A. He helped me find them. That was quite some time ago.

Q. Do you have the O.P.A. book from which you got those figures, here? A. Yes.

Q. Now, your item 5, Miss Callahan, Martin & Son, ready mixed concrete, \$8,750.00; from where did you get that information?

A. Well, that's the amount of their contract.

Q. Do you have their contract here?

A. I believe I do. I don't have it here, right at this [2212] moment, but I have it in Yakima.

Q. Well, how did you arrive at that figure?

A. I do have the file with all their statements and checks, their progressive monthly payments; is that what you mean?

Q. Well, I'm just trying to find out where you got the figure, whether the contract was a lump sum contract, or——

A. No, it was paid progressively.

(Testimony of Elizabeth Callahan.)

Q. Well, would you get us those figures, Miss Callahan? And your Potlatch Yards, nails, wire, and so forth, \$571.56, do you have those figures here, invoices? A. Yes.

Q. The folder that you have handed me last, marked item 5, 1068, refers to item 5 on your Exhibit 91? A. Yes.

Q. And the same thing with your folder marked Item 6, Manila folder, that refers to item 6 of your Exhibit 91? A. Yes.

Q. Now, item 7—item 8, is——

A. Ropes, Inc.

Q. And the supporting data on that is included in the manila folder, item 8, 1068?

A. Right.

Q. Now, your item 9, do you have a folder for that? [2213] A. Yes, I have.

Q. That's marked item 9, 1068. Do you have item 7? I did skip item 7, Miss Callahan.

A. Yes, I do.

Q. That's marked item 7, 1068. Now, what is your next item there? A. Item 10.

Q. Item 10. Do you have 11, 12——

A. Yes.

Q. What is that?

A. Ray Shingshang, placing re-enforcement steel.

Q. Have you got another one? Item 13. Does that include the data on all of your items, now? Miss Callahan, on item 12, Ray Shingshang, placing re-enforcement steel, that represents a total of the

(Testimony of Elizabeth Callahan.)

checks which are included in the folder marked item 12? A. Yes.

Q. Do you know whether or not he was employed under a contract?

A. No, he was sent over there to place the reinforcing steel. I called him myself.

Q. Pardon?

A. I called him myself. He was working for us elsewhere, and when it was time to place that steel, he was sent over.

Mr. Olson: Now, your Honor, last night there was [2214] entrusted to me Exhibits 91, 101 and 102. Your Honor now has, I think, 91, and I am now returning 101 and 102. That's all the cross-examination.

The Court: All right.

(Whereupon, folder of bills, checks, etc., on item 5, specification 1068, was marked defendant Macri's Exhibit No. 107 for identification.

(Whereupon, folder of bills, checks, etc., on item 6, specification 1068, was marked defendant Macri's Exhibit No. 108 for identification.

(Whereupon, folder of bills, checks, etc., on item 7, specification 1068, was marked defendant Macri's Exhibit No. 109 for identification.

(Whereupon, folder of bills, checks, etc., on item 8, specification 1068, was marked defendant Macri's Exhibit No. 110 for identification.

(Testimony of Elizabeth Callahan.)

(Whereupon, folder of bills, checks, etc., on item 9, specification 1068, was marked defendant Macri's Exhibit No. 111 for identification.

(Whereupon, folder of bills, checks, etc., on item 10, specification 1068, was marked defendant Macri's Exhibit No. 112 for identification.

(Whereupon, folder of bills, checks, etc., on item 11, specification 1068, was marked defendant Macri's Exhibit No. 113 for identification.

(Whereupon, folder of bills, checks, etc., on item 12, specification 1068, was marked defendant Macri's Exhibit No. 114 for identification.

(Whereupon, folder of bills, checks, etc., on item 13, specification 1068, was marked defendant Macri's Exhibit No. 115 for identification.)

Mr. Olson: I may wish to recall Miss Callahan about these afterwards.

Mr. Holman: Counsel, do you want this National Defense marked, or not.

Mr. Olson: I don't care whether it is marked or not, but I want to use it.

Mr. Holman: For identification, Mr. Clerk.

(Whereupon, Title 32, National Defense Chapter 11, Part 1399, was marked defendant Macri's Exhibit No. 116 for identification.)

Mr. Olson: Your Honor, if these identifications have to be sub-marked, why, we're not going to have them in time to do us any good.

(Testimony of Elizabeth Callahan.)

Mr. Holman: Your Honor, I have no objection to Mr. Olson himself using any of the files, just as they are, if he will not part with them to others, and disarrange them. They're in order for the accounting, and that's the only purpose of sub-marking them.

Mr. Olson: I wonder if the United States Marshal [2216] could accompany our accountant and watch him? They're not going to do me any good.

Mr. Holman: That inference is not my purpose at all. They're in line for the bookkeeping set-up of the business, and I'd like to keep them that way, plus the fact that way plus the fact that it's already been shown that it is convenient to refer to a particular paper.

The Court: Well, I think that arrangements could be made to have access to them in the Clerk's room under his supervision. Would that be acceptable?

Mr. Olson: That's fine. I have in mind handing them to Mr. Hendershott and having him go some place right in the courthouse.

Mr. Holman: If they're not taken out of order, Mr. Olson, and you deliver them to Mr. Hendershott for that purpose, I have no objection, but to have them pulled apart——

The Court: It is understood they will be kept in the same order.

Mr. Olson: We'll do our best to keep them in order. We have no desire to disarrange the files.

The Court: Will that be acceptable?

(Testimony of Elizabeth Callahan.)

Mr. Holman: With Mr. Hendershott, your Honor.

The Court: Mr. Granger will be in the office, and he can supervise the inspection of them. [2217]

Mr. Holman: Do you say you may want further cross-examination?

Mr. Olson: I may, yes.

Mr. Holman: Shall I proceed with redirect as far as they've gone, your Honor?

The Court: All right.

Redirect Examination

By Mr. Holman:

Q. Miss Callahan, I'm referring to exhibit 104, and the sub-numbers, which counsel asked you about. I'll ask you—will you make memo of these and then I want to ask you one question about all of them. Sub-number 58, 72, 2, 6, 10, 12, 18, 21, 26, 32, 47, 49, and 50. Will you tell me which of those have been paid by check of Macri and Company, charged to 1062?

Mr. Olson: Did you say by check to Macri and Company?

Mr. Holman: No, by check of Macri and Company, charged to 1062.

The Court: These are the same ones, 104?

Mr. Holman: Those are the same ones counsel offered, your Honor, for lumber.

Mr. Olson: I'm going to object to that question, your Honor, on the ground that it's asking for a matter that's not the best evidence, and on the further ground that it will be a self-serving statement,

(Testimony of Elizabeth Callahan.)

and not proper [2218] redirect examination, because the witness testified in making up the compilation that she made it up from the data contained in Exhibit 104.

Mr. Holman: But your Honor, this is with respect to items of payment, and it was shown merely for the purpose of the lumber going into the job, the quantity of lumber; the figures were not involved.

Mr. Olson: What figures?

Mr. Holman: The prices were not involved; merely quantities of lumber.

Mr. Olson: Well, I didn't go into prices.

Mr. Holman: No; I say, they're not involved.

The Court: The only thing that could have a bearing here on the question at issue, as I see it, would be some notation on the check designating them as 1062 or otherwise.

Mr. Holman: That's what I have in mind, your Honor.

Mr. Olson: We didn't use the checks, your Honor, in cross-examination, and she didn't use the checks in making up the compilation. She used this Exhibit 104.

The Court: I don't believe there is any evidence that she did use the checks. She didn't draw the checks, did she?

Mr. Holman: I presume she drew them; she didn't [2219] sign them.

The Court: It seems to me it would be self-serving, a notation on the check as to where the segregation should be made. Sustain the objection.

(Testimony of Elizabeth Callahan.)

Mr. Holman: Could Miss Callahan go to get those books, your Honor, if they're at the hotel? You wanted the books, did you not, counsel?

Mr. Olson: Yes, that one that supports that one item.

The Court: I think she said there is one book or some records that she has that are here, and one in Seattle.

Mr. Olson: I didn't understand any was in Seattle. Item 4 on Exhibit 91, the rental, as I understand, that's in the books, and I wanted to see the books on that item.

The Court: Do you have that book here, Miss Callahan?

Witness: No, I don't.

Q. (By Mr. Holman): Where is it?

A. In Seattle.

Q. Those are books of the other company?

A. Part of them, yes.

Q. What company would that be?

A. Well, that would be—no, that would be Macri and Company.

Q. But what books, what job? [2220]

A. 1068.

Q. Are the 1068 books here?

A. Not all of them, no. Not complete.

Q. How much books do you have on 1068 here, Miss Callahan?

A. Just the check register, I believe.

The Court: Well, get what records you have here that counsel wants, and bring them back as soon as you can, Miss Callahan.

Mr. Holman: Your Honor, I have one other witness. The Marshal is out with a forthwith subpoena, and I thought he'd be back by 10:30. He hasn't returned yet. That would be my final witness.

The Court: Well, I can take a mid-morning recess now, and by the time we get through, we should proceed anyway.

(Short recess.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, the Marshal has informed me that he will be unable to serve that subpoena until noon.

The Court: Well, let's proceed, then, with rebuttal, with the understanding that you may reopen and call the witness when he's available. Is there any objection to that? [2221]

Mr. Olson: No, your Honor.

The Court: And also, of course, subject to your right of cross-examination of Miss Callahan.

Mr. Olson: I believe Goerig and Philp have something they wish to put in, at any rate.

The Court: Oh, yes, do you have anything to put in for Goerig and Philp, Mr. Hawkins?

(Whereupon, assignment Macri to Seattle-First National Bank was marked defendants Goerig & Philp Exhibit No. 117 for identification.)

Mr. Hawkins: The first matter I want to take up is this exhibit. This exhibit relates only to the

issues between Goerig and Philp and the Macris. It was stipulated in connection with the cases that started on the 19th of February in this court that we could secure a copy of the assignment from Mr. DeWolf Emory, an attorney in Seattle, and that this copy could be introduced into evidence as the original, upon Mr. Emory's statement that it was a copy of the original, and that that exhibit would be admitted not only as evidence in those cases, but in the cases that are presently being tried before your Honor, and I have this letter dated February 27 on the letterhead of Emory and Howe, attorneys at law in Seattle.

Mr. Holman: You don't want it in the record yet. [2222] Did you want to read the letter into the record?

Mr. Hawkins: Well, I thought I would. I am offering it at this time, and I'm presenting the matter to the Court.

The Court: Well, is there objection to its admission?

Mr. Holman: Yes, your Honor. The objection is this; not as to this being a carbon copy, nor as to it being typed signatures, nor as to the fact that there was an assignment, but basically, the objection is this, your Honor: Counsel interrogated Mr. Macri on the stand with respect to this, even including the matter of whether his notes had been demanded for payment, and he said that they had, several times, as I recall the testimony, but the assignment itself is supplemented by a copy of the complaint and summons as served on Mr. Goerig,

and I think if one goes in, the other should go in too; otherwise the Court doesn't have the story.

Mr. Hawkins: Well, I understand the summons and complaint already is in evidence in those other cases, and of course I have no objection to its being in evidence in this case.

Mr. Holman: Now, the objection we have, and the only objection we have, is that the assignment upon its [2223] face purports to be a complete assignment of all interest which Macri may have against Goerig and Philp under the agreement terminating joint venture, which is in evidence, but under the testimony which Mr. Macri has given it is evident that this is, after all, an assignment to secure an indebtedness, and is not a final or complete sale and transfer, and therefore the effect of the assignment so far as these cases are concerned is the same as if there had been a mortgage and note, and that that had not yet been foreclosed, or if a foreclosure proceeding had been started and had not yet been terminated. So far as the ultimate fact of assignment is concerned, if correlated to the whole transaction at the bank we would have no objection whatsoever, but in the absence of complete proof as to the true relationship with the bank, it is not admissible.

The Court: What does this letter and this document show, that it is an assignment for security?

Mr. Holman: No, just an assignment, your Honor.

Mr. Hawkins: Your Honor, the complaint introduced in evidence shows that the assignment was

given as collateral security. Mr. Macri on the stand, if I recall his testimony correctly, admitted he had executed an assignment to the bank to secure an indebtedness to the bank, and that that indebtedness had not been paid, [2224] although demand had been made.

The Court: Was that in this case?

Mr. Hawkins: No, not in this case.

Mr. Holman: I will stipulate he would testify the same in this case.

The Court: It is stipulated, then, he would testify the same in this case as he testified in the prior cases, as to the assignment; and you're not objecting that it is a copy?

Mr. Holman: No, no; we had that agreement.

The Court: Then I think I should admit it in evidence and determine what weight it should have later.

Mr. Hawkins: I might call your attention to the fact that the assignment is undated and unacknowledged, and Mr. Emory states that is the case with the original. Although these blanks show, that doesn't mean it is not a correct copy.

(Whereupon, defendants Goerig & Philp Exhibit No. 117 for identification was admitted in evidence.)

Mr. Olson: Your Honor, I might possibly save counsel a little trouble. I anticipate that this witness he's got subpoenaed is Mr. John Klugg.

Mr. Holman: That's correct.

Mr. Olson: And I myself served Mr. John Klugg [2225] with a subpoena last night to be here at 1:30 this afternoon.

The Court: Well, he should be here, then, without your serving another subpoena.

Mr. Olson: Counsel can do as he likes about it.

The Court: If you have subpoenaed him, that should be sufficient.

Mr. Holman: That's all I want.

Mr. Olson: I did serve John Klugg with a subpoena last night to be here at 1:30 this afternoon.

The Court: It will be understood, then, that he will be available to either party.

Mr. Olson: Now, your Honor, in connection with our rebuttal, I'd like to offer in evidence Macri's identification 69 and Macri's identification 68. 68 and 69 are both on the letterhead of the Concrete Construction Company, each addressed to Macri and Company, were produced by the defendant Macri out of his files, showing claims presented for additional compensation, and are offered, your Honor, in connection with their testimony that they at all times were dealing under the sub-contract without objection from us.

The Court: Did you show those to counsel?

Mr. Holman: These were produced, your Honor, and identified by Mr. Schaefer on cross-examination. We [2226] object to them for the reason that they are self-serving documents. The only inquiry made of Mr. Schaefer and the answer to which he gave was that with reference to identification 68 he had billed for a total of \$35,745.73, and that with

identification 69 of August 14, 1945, he had billed for \$43,837.25. That was the extent to which the inquiry went. The items presented in these various statements, in these two statements, are items prepared by the use plaintiff, and would be part of their case in chief, and they were here as identifications as part of the case in chief, and were not used, so that the matter of combatting, the time items specified in the two identifications has prevented the defendants from having an opportunity to cross-examine with respect to those entries, if counsel had examined as to them under the identifications as part of his case in chief. Now, to offer them merely for the purpose that they had been used, I submit is not proper rebuttal.

The Court: Is there any objection on the ground of lack of sufficient identification on them?

Mr. Holman: Mr. Schaefer did identify them, your Honor, on my cross-examination.

The Court: Was it shown that the originals were mailed to Macri and Company?

Mr. Holman: They came out of Macri and Company's [2227] file, your Honor. They were produced out of my files. There is no question of those having been received in due course, but I had them identified, may it please the Court, for the particular purpose of giving counsel opportunity to interrogate as to them, either or redirect or in chief, and they did nothing about it, and they were not identified for the purpose of fixing anything except the ultimate amounts, as a matter of billing.

Mr. Olson: I would like to be heard further.

The Court: Well, perhaps I might save a little time by saying that the principal purpose, as I recall, of introducing the checks and check vouchers showing the payment by Macri to Schaefer was to show that the parties continued to deal under the sub-contract, and that Mr. Schaefer had accepted without protest or without comment, presumably, progress payments made from time to time under the sub-contract. That was the main purpose, as I recall, of the introduction in evidence of the checks and check vouchers, because the amount of the payment by Macri to Schaefer has been settled and agreed upon in pre-trial conference. It strikes me that these identifications here should be received in evidence for the same purpose, not as evidence of the amount of extras or the amount of loss, but merely by way of rebuttal in rebutting the evidence that there was dealing throughout [2228] under the sub-contract, and that payments were made and accepted.

Mr. Holman: There is no issue of fact on that. They were received currently; the one, your Honor will note, is undated.

The Court: They simply show that at that date Mr. Schaefer was making claims outside of and beyond the sub-contract, and that is the sole purpose for which they will be admitted.

Mr. Holman: Your Honor, these are subsequent to completion of performance, and they would hark as to payment of those bills that Macri paid, and not with the first set of checks that had to do with the job.

The Court: I understand that, but I think the time element would go to their weight, instead of admissibility. I want it distinctly understood that the Court does not consider they have any probative value as to their contents.

Mr. Olson: Our position has been that we're suing for the reasonable value of our services, and this is in connection with their case that we never submitted them any statements, never submitted any bills, and never complained about the payments being made under the sub-contract.

(Whereupon, defendant Macri's [2229] Exhibits Nos. 68 and 69 for identification were admitted in evidence on behalf of the plaintiff.)

Mr. Olson: Now, I would like to call upon counsel for Macri and Company to produce his copies of the documents entitled invoice 1558, invoice 1539, invoice 1540, invoice 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, all dated January 26, 1945, with the exception of invoice 1548, which is dated February 3, 1945.

Mr. Holman: May I see what they are?

Mr. Olson: Marked defendant's Exhibit 8 to the deposition of Mr. Schaefer taken in counsel Holman's office.

The Court: I don't know that I get just what those invoice numbers refer to.

Mr. Olson: Well, they're just an identification number on the top of each of the letters. Your Honor hasn't seen these, I don't think, or has nothing to go by. I'm just giving them for identification

to Mr. Holman. They are likewise statements Mr. Schaefer submitted to Macri and Company for additional compensation.

Mr. Holman: Did you say that was in the deposition?

Mr. Olson: This was referred to in the deposition, yes, and you had this marked as an identification by the [2230] reporter, but I believe that is my copy, Mr. Holman, and what I'm asking for is your copy, if you have it.

Mr. Holman: Where is it in the deposition?

Mr. Olson: It is marked there.

Mr. Holman: Well, I know, but whose deposition?

Mr. Olson: Mr. Schaefer's deposition. It is referred to on page 14 of the deposition, in one place; page 13.

Mr. Holman: In my copy of the deposition Schaefer starts at page 22 and refers to six documents on page 28.

Mr. Olson: Well, mine on Mr. Schaefer commences at page 1. The reporter on mine has started with page 1 at each deposition, that is, he takes one witness, starts with page 1, when he comes to the next witness he starts renumbering. Oh, yes, it starts on 22, then goes up to 36, and then starts with 1. I think they had a change of reporters on Mr. Schaefer's deposition, so it is numbered 22 to 36 and then it starts with page 1 again, and it is on page 13 of the second number, the second numbered page 13 of Mr. Schaefer's deposition.

The Court: Has there been a previous demand for the production of these documents?

Mr. Holman: No, there has not.

Mr. Olson: But they were marked as an exhibit to [2231] Mr. Schaefer's deposition, and——

The Court: Oh, I see, they were documents that were produced when Mr. Schaefer's deposition was taken.

(Discussion of deposition by counsel.)

Mr. Olson: Well, will you produce a copy of your letter to Mr. McKelvey dated March 14, 1945?

Mr. Holman: Did you demand these? I thought I furnished all that you demanded.

Mr. Olson: And Mr. McKelvey's letter to you dated March 9, 1945.

Mr. Holman: Mr. Olson, I did supply you with all that you made written demand on, did I not?

Mr. Olson: Well, give me the letters.

Mr. Holman: Well, I'm asking you if I didn't?

Mr. Olson: We'll spend less time if you give me the letters. I think you did, Mr. Holman.

Mr. Holman: March 9, from McKelvey. I have that letter. Do you want that?

Mr. Olson: Yes.

Mr. Holman: March 14; here it is.

Mr. Olson: Now, Mr. Holman, do you have the claim, reading the first paragraph of this letter of March 9: "We are enclosing herewith copy of claim presented to us by the Concrete Construction Company, made against Macri and Company." Now, do you have that claim? [2232]

Mr. Holman: I am very much under the impression that that is the one marked Exhibit 68, but I don't know, since Exhibit 69 is August 14, which would be after the date of that letter. I know it was this one I have marked myself, you see, it was sent to our firm, and I marked "file Macri and Company" so that one is an August date.

(Whereupon, Letter McKelvey to Holman, dated March 9, 1945, was marked plaintiff's Exhibit No. 118 for identification.)

Mr. Holman: By the way, you asked for one letter of March 14. There are two letters of March 14, one referring to 1068, and the other 1062. Do you want them both? I think this should be in, too, your Honor, March 12, because it refers to the claim of \$35,745.73, which is Exhibit 68, so I think the letter of March 12 should be part of the correspondence, too, but the point I'm making, Mr. Olson, in asking for a letter of March 14 from me, there are two to McKelvey on March 14. That's the one on 1062. Do you want the one on 1068 also?

Mr. Olson: I'll take a look at it. Well, you do not have them in your files, the compilation of the invoices that I just mentioned?

Mr. Holman: No, that's never been sent, never been submitted, and never been seen until it was marked [2233] for identification at that time, and not produced when McKelvey was in the office. Now, I have considerable more correspondence with McKelvey—

The Court: Am I correct in assuming now that this correspondence, at least it is not shown that they were received by Mr. Macri in due course of mail, but sometime during negotiations Mr. McKelvey brought them into your office?

Mr. Holman: Yes, brought them in, but they were neither shown nor discussed.

The Court: And weren't left with you?

Mr. Holman: No, no; never have had them.

Mr. Olson: Of course, we'll endeavor to show otherwise.

Mr. Holman: I hope you can.

The Court: I just wanted to get Mr. Holman's position on the matter. I'm interested now in the matter of production.

(Whereupon, statement by months of costs by Schaefer on 1062 was marked plaintiff's Exhibit No. 119 for identification.) [2234]

M. C. SCHAEFER

the plaintiff, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Schaefer, showing you defendant's Exhibit number 105, would you examine that and state whether or not you ever saw that before it was produced in court here yesterday? A. I did not.

Q. Was it ever received, the original of that, or a copy, ever received by you in the mail?

A. It was not.

(Testimony of M. C. Schaefer.)

Q. Now, I notice that it says on the top of it a corrected statement. Was any similar statement of which that may be a corrected statement ever mailed, furnished or handed you by Macri and Company or any of his representatives?

A. It was not.

The Court: May I see that, please?

Q. Now, showing you plaintiff's identification 119, Mr. Schaefer, can you state whether or not the original or a carbon copy of that statement was ever handed to Mr. Macri or to his attorney, do you know? A. I couldn't state as to that.

Q. Pardon?

A. I couldn't state that it was ever handed to them. I did not, I don't believe. I believe this here was mailed by myself to Mr. McKelvey, who was representing me at the time. This was gotten up at the request of Mr. Holman at a meeting in Mr. Holman's office on January 23. He wanted a breakdown as to what our costs were, what our expenses had been by the month.

Q. What discussion did you have then about costs? [2235]

A. Our discussion at that time was——

Q. Who was there, first, Mr. Schaefer?

A. At that time there was present Mr. Holman, Mr. Macri, Mr. McKelvey, Pat Darcy, William E. Schaefer, Roy F. Owen——

Mr. Holman: Who? A. Roy Owen.

Mr. Holman: That was the surety man?

A. That was the surety man, yes.

(Testimony of M. C. Schaefer.)

Q. Whose surety?

A. Well, he is an insurance adjuster, in his own business.

Mr. Holman: For the Glen Falls?

A. Roy F. Owen and Company.

Mr. Holman: For the Glen Falls? A. Yes.

Q. All right; now, what discussion was had then?

The Court: What date was this?

A. January 23.

Q. What year?

A. 1945. The discussion that time, that is, there had been previous discussions between McKelvey's office and Holman's office——

Mr. Holman: I move that be stricken as hearsay, your Honor.

The Court: Yes, that will be stricken. Tell what [2236] happened at that time, and what was said, Mr. Schaefer.

A. Well, at this meeting, and the purpose this was gotten up for was to arrive at a price, there was negotiation at that time to arrive at a new price for 1062, and also for 1068, and this was gotten up to show what our expenses had been, and before this time I had given Mr. McKelvey figures of what the average——

Mr. Holman: Your Honor, I object to the witness testifying as to his transactions with McKelvey. Naturally we can't combat those.

The Court: Yes, that is improper and will be stricken. Just confine yourself to what was said and done at this meeting.

(Testimony of M. C. Schaefer.)

A. Then at this meeting, further, there was discussion about the excavating, and we showed some of the pictures of the excavations, and at that meeting Mr. Macri or Mr. Holman stated for Mr. Macri that Mr. Macri was being paid for the quantity that he'd excavated, that he was not being paid for the quantity according to the specification, that is, on the 1 to 1 slope, and I asked Mr. Holman, and further Mr. Holman said he didn't know where Uncle Sam was paying anyone for other work, and he couldn't see how he was going to receive additional compensation out of that from Uncle Sam; well, I says "What will your attitude on that thing be if it is [2237] proven that Mr. Macri is being paid for excavation out one foot and on a 1 to 1, according to specification?" and Mr. Holman stated "Well, if that's the case, why, you may have a good legitimate claim against Sam Macri Company."

Q. Now, Mr. Schaefer, do I understand you're unable to say that a copy of this identification 119 was handed to Mr. Holman or Mr. Macri that day?

A. Not that day it was not.

Q. And you personally do not know whether or not it was ever handed to Mr. Macri or Mr. Holman?

A. No, I don't; that is, in my later conversation with Mr. McKelvey—

Q. Well, you can't go into that. With further purpose of identifying this 119, I'd like to call Mr. Macri, then, your Honor.

(Testimony of M. C. Schaefer.)

Mr. Holman: I would like to cross-examine this gentleman sometime.

The Court: All right, cross-examine before he leaves, then.

Mr. Olson: I might say I have considerable more rebuttal with Mr. Schaefer on other points.

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, was it not a fact that prior to the date—you say this meeting was on January 23, 1945? [2238]

A. That's right.

Q. Was it not a fact that prior thereto you authorized Mr. McKelvey to make the following proposition: That the Concrete Construction Company will carry out and finish contract number 1, that all costs are to be paid by Macri, and waive any performance or loss or damage hereto, and Macri similarly waive as to Concrete Construction Company; did you authorize that, or not?

A. I did not.

Mr. Olson: That question is objectionable in the first place, in asking for an attempted compromise.

Mr. Holman: Yes; well, this is all in compromise.

Mr. Olson: I wasn't going into that.

Q. You say you did not do that, sir?

A. I did not.

The Court: I'll overrule the objection.

Q. Now, isn't it a fact that at that meeting, and I'll have this marked for identification, may it please the Court, I'm taking it from my file——

(Testimony of M. C. Schaefer.)

(Whereupon, notation made by Mr. Holman at meeting was marked Defendant Macri's Exhibit No. 120 for identification.)

A. ———that in your presence, right at my desk, I made these entries as a proposition you were submitting, and made those drawings with respect to what you were stating [2239] about slopes, right under your nose, sir? Didn't you see that?

Mr. Olson: Now, that's objected to, as being notations made, whether they were made under Mr. Schaefer's nose or not, if Mr. Schaefer didn't make that proposition, then the fact Mr. Holman made a note that may have been to the contrary is certainly immaterial.

The Court: Well, I'll overrule the objection. I think the question is whether or not notations were made.

Mr. Holman: Yes, sir, in his presence.

Witness: I couldn't say to that; I don't recall.

Q. Do you recall that you and your brother, flanked by Mr. Darcy, sat on one wall, and that your surety representative sat over on the other wall, along with Mr. McKelvey? Do you recall that?

A. The surety I believe sat near the door entrance into your office.

Q. Yes. Now, it's a fact, is it not, Mr. Schaefer, that that was a very long conference, right?

A. I wouldn't say how long the conference lasted.

(Testimony of M. C. Schaefer.)

Q. It's a fact, was it not, that you had already been served with a notice that you were not to go on 1068, correct?

A. We were served with a notice?

Q. Yes, sir. [2240] A. That's right.

Q. Yes, sir; and it's a fact, is it not, that this meeting was solicited and promoted to a meeting by you, through your attorney, with us; requested, was it not; the meeting was requested?

A. That I requested the meeting through——

Q. Mr. McKelvey.

A. ——through Mr. McKelvey? I don't believe so.

Q. Did you have any word from me to come to a meeting?

A. I believe Mr. McKelvey asked me to come to Seattle and we would have a meeting with you at your office.

Q. Yes, sir; but you had no communication either from Mr. Macri or me to come to a meeting, did you? A. No.

Q. Now, isn't it a fact that at that time, on that date, was the first time that you had ever mentioned slopes, and that these drawings were made to mark out what you were talking about, made on the desk and pointed out by you as drawings of what you were talking about?

The Court: There's several questions in there, I think, Mr. Holman; whether that wasn't the first time you mentioned slopes——

(Testimony of M. C. Schaefer.)

Q. Whether that wasn't the first time you mentioned slope in any conference with me?

A. Yes, because that's the first conference I had with you. [2241]

Q. And wasn't it also a fact that these drawings were made by me as you indicated?

A. There were some sketches made by you.

Q. Yes; you recognize these, do you not?

A. I wouldn't be able to say.

Q. And wasn't it a fact that at that time you were proposing as a compromise and settlement, \$49.15 per cubic yard for the first contract, and \$28.00 per cubic yard——

Mr. Olson: I object to that, except insofar as it goes to show that they were negotiating for a price different than the sub-contract, otherwise it is incompetent.

Mr. Holman: Well, counsel called him for the purpose of showing Schaefer was in the office and there were negotiations for re-settling the contract.

The Court: It seems to me that's the only purpose this sort of testimony can serve in this suit. I don't think any party is bound by any offer they may have made by way of compromise settlement. I don't think you should be permitted to go into detail into offers and counter offers that extended over a long period of time. I think the only thing to show is that the parties didn't agree, and they tried to make some other arrangement. That's about all I can see that would be material.

(Testimony of M. C. Schaefer.)

Mr. Holman: That's my purpose. This gentleman [2242] has quoted me in the conference, and I'm very frank to say I can't remember what I said in that conference.

The Court: I wouldn't recognize as having any probative value any offer or counter offer, except to show the parties were in disagreement, and attempting to reach an adjustment.

Mr. Olson: That's my purpose in meeting in rebuttal at least the inference they were giving that there was no controversy as they went along.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Calling your attention to the notation on here, \$49.15 per cubic yard, and then a deduction of \$26.00, which was your bid, was it not——

A. \$26.00 was my bid.

Q. ——left a difference of \$23.15, broken down; you see that?

Mr. Olson: That's the very testimony I understood your Honor to say should be excluded.

Mr. Holman: Well, I wanted that in evidence as counter to counsel's last, your Honor. That's the only purpose it would have.

The Court: Let's see that.

Mr. Holman: Those are my memos, made at that conference, and that's all it could be, your Honor; whether it has any probative value or not, at least that's current. [2243]

(Testimony of M. C. Schaefer.)

The Court: Well, I'll reserve ruling on this. There's no document identified by Mr. Schaefer this last time on the stand that's been admitted. It hasn't been offered yet. Is that all, then, now?

Q. Well, except that broken down, was to be broken down, so that you would show how you comprised your \$49.15, wasn't it?

A. No, I don't recall them there figures at all.

Mr. Holman: All right, sir.

The Court: Did you want to call Mr. Macri now?

Mr. Olson: I did, in connection with this identification 119.

Mr. Hawkins: Can I ask Mr. Schaefer a question?

The Court: Surely.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, when you were in Mr. Holman's office with Mr. McKelvey, you were negotiating a settlement of the dispute that you had had with Mr. Macri, is that what I understand your testimony?

A. The reason for it was as to what—that is, Mr. Holman wanted to find out from me as to what work we were doing that we claimed wasn't a part of our work, and wanted to get a picture of the condition and the things that we were complaining of.

Q. You pointed out, I take it, at this conference, that Mr. Macri [2244] had not, according to your

(Testimony of M. C. Schaefer.)

lights, at any rate, excavated on a 1 to 1 slope; you pointed that out to them at that time?

A. That's right.

Q. And you complained that the contract required a 1 to 1 slope, is that right?

A. It was the——

Q. It was your position, in other words, at that meeting that this sub-contract between yourself and Mr. Macri required Mr. Macri to excavate to a 1 to 1 slope, and he was not doing that, is that right?

A. The specifications required that he do it that way.

Q. Yes, and that he was not doing as he agreed to under his sub-contract, is that right?

A. That's right.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.) [2245]

SAM MACRI

one of the defendants, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Mr. Olson: Your Honor, this is the identification which I once withdrew as identification 32. I would like to have it re-identified now.

The Court: All right, we'll have it re-activated. Will it have another number?

The Clerk: Let it remain as 32.

The Court: The record will show that it is again presented.

(Testimony of Sam Macri.)

Mr. Olson: I would like to have the record so show, that I'm again presenting plaintiff's identification 32.

Direct Examination

By Mr. Olson:

Q. Now, Mr. Macri, handing you plaintiff's identification 32, and also plaintiff's identification 119, I'll ask you to read the first paragraph of plaintiff's identification 32, which is a copy of a letter addressed to Macri and Company, and to then examine plaintiff's identification 119, and tell me whether or not you did not receive 119, accompanied with the original of that letter, identification 32; the first paragraph is what refers to that exhibit.

A. Well, everything I receive I turn them over to Mr. Holman. [2246]

Q. Just a minute; I asked you to read the first paragraph of identification 32, then to examine identification 119, and tell me if you did not receive identification 119, or a carbon copy of it, or the original of it, as the first paragraph of that letter addressed to you says you did?

A. Absolutely not; I never received any of this copy, absolutely not, not one.

Q. Did you receive the original of this letter?

The Court: He's referring now to 119; he's waving it. The record should show it is 119. Now, did you get the last question?

A. Yes, your Honor; Mr. Matt Schaefer of Concrete Construction Company has furnished me with——

The Court: The question is, did you receive it?

(Testimony of Sam Macri.)

A. No, I don't recall receiving anything like that.

Q. Did you ever see this plaintiff's identification 119 before? A. No, sir.

Q. Never saw it? A. No, I never saw once.

Q. You saw it in Mr. Holman's office in Seattle?

A. Not this kind of stuff, no.

Q. You were right there, Mr. Macri, when we had it in Mr. Holman's office and it was marked for identification there?

A. You mean you had it? [2247]

Q. Yes, I had it, and Mr. Schaefer had it.

A. I didn't pay any attention to that.

Q. You didn't pay any attention to what was going on there? A. Not this stuff here.

The Court: Any further questions, Mr. Olson?

Mr. Olson: No.

Mr. Holman: In connection with counsel's offer, I would like to have marked for identification the original of the letter of December 5, 1944, and either our copy or the original produced by counsel of a letter to the Concrete Construction Company from Macri and Company on December 27, 1944.

The Court: Well, we'll have to proceed with some sort of order here. We'll let Mr. Olson make his offers, and then you can produce those others later on.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The Court will recess until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Wednesday, March 19, 1947,
1:30 o'Clock P.M.

(All parties present as before, and the trial
was resumed.)

The Court: Is your witness here, Mr. Holman?

Mr. Holman: He is, your Honor.

The Court: Had you come to a convenient break
in your rebuttal here, Mr. Olson?

Mr. Olson: Yes.

The Court: I think, then, we had better finish
Mr. Macri's case, and proceed with the rest of the
rebuttal.

Mr. Holman: Call Mr. Klugg, please.

JOHN KLUGG

called as a witness on behalf of the defendants
Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name is what, please?

A. John Klugg.

Q. I understand you have a bad cold. Can you
talk up pretty well, Mr. Klugg?

A. It is pretty hard for me to talk too loud.

Q. Talk as loud as you can, please. What is
your full name?

A. John Joseph Klugg.

Q. And where do you reside, Mr. Klugg?

A. 815 South 5th Avenue.

Q. Yakima?

A. Yes.

(Testimony of John Klugg.)

Q. And you have been at that place of residence since before February 1, have you, 1947 [2249]

A. Yes.

Q. You've been there right along? A. Yes.

Q. Will you state your experience, please, in connection with performance of form panels for structures on reclamation jobs, the forms to contain the placing of concrete for reclamation work?

A. I started 'way back in 1922.

Q. 1922, sir?

A. 1922, when I first started.

Q. Where?

A. At Montana, Yellowstone Lake.

Q. And how long did you work?

A. I worked there a couple of years, and since 1930 I mostly worked steady on reclamation.

Q. Was that on reclamation work?

A. The biggest part.

Q. And then what has been your experience since?

A. Well, most of it out on part time contracting, and then done some house work, but most of it's been on this reclamation work.

Q. Yes, sir, and is it or is it not a fact that you right now are on a construction job, Mr. Klugg?

A. Yes.

Q. Is it or is it not a fact that I talked with you within [2250] the last week, and you explained that you couldn't come to testify willingly at all, or at least you couldn't come until the water was in your ditches, is that correct? A. That's correct.

(Testimony of John Klugg.)

Q. And the water is in your ditches now?

A. Yes, we got the last pour today.

Q. Now, Mr. Klugg, what is the type of work in the job you're performing now?

A. It's the pumping stations for the Roza Project.

Q. And are you familiar with the job 1062, schedule 1, the Macri job?

A. With when I was on there with Schaefer, yes, sir.

Q. Yes, sir; you were on that job, were you not, throughout the job? A. Yes.

Q. What was your work, Mr. Klugg?

A. I was doing shop work, building forms.

Q. And you started for whom?

A. For Mr. Macri.

Q. And you continued how long for Mr. Macri?

A. Oh, it was only about a week or two, I think, when he subbed it to Concrete Construction, then I automatically went over with the other job.

Q. Now, in the week or so that you were working for Mr. Macri, had there been lumber delivered there on the job [2251] for building panels?

A. Yes, I guess so; there was some.

Q. And how did you spend your time in that week?

A. Well, we started first, we built the office, and then we started to build forms.

Q. And will you tell the Court with reference to the forms how you were building them, whether you were building them to use over and over again, or not?

(Testimony of John Klugg.)

A. Yes, they were built so we could make the panels.

Q. Explain that to the Court.

A. Certain type forms we could use over, and they fit in certain places—not for every structure.

Q. In connection with the Bureau of Reclamation project of this kind, what is the plan with respect to keeping the water up on the ground, or below the ground, as much as possible?

A. How's that?

Q. I say, in reclamation projects such as this 1062, what is the practice of keeping the water up on top of the ground as against keeping it below the ground; which do they do?

A. Well, they built a lot of pipe connections that goes on top, and other places they put in pipe that goes underneath the ground, and then comes out at a different elevation. [2252]

Q. Now, is it or is it not a fact the water is on top of the ground and when it goes down it is to go under something, and then comes up again to the desired level?

A. Well, it sometimes goes under a road, and other times through a draw, and comes up again on the other side, on a different level.

Q. Were there on this job, do you know, from your carpentry work, a number of what would be known as box structures, standard box structures?

A. Yes, there's some; the delivery boxes is mostly standard.

(Testimony of John Klugg.)

Q. And what would be the size of those, about?

A. Well, for the delivery boxes it's mostly four by four.

Q. Four feet by four feet?

A. Yes, and some three by three, and we had some five by five and six by six; it all depends on the size of the——

Q. Well, would that be the square dimensions?

A. Yes.

Q. And what would be the depth?

A. Three foot, two foot, six; up as high as I think six and a half or seven feet.

Q. And would that be the structures that went under?

A. The deep ones is mostly the pipes either come in, on a deep box, or going out of it.

Q. Mr. Klugg, do you remember being out on the job with a Mr. Mercelle of the Concrete crew, and with Mr. Macri, [2253] for the purpose of measuring some excavations?

A. Yes, we went out there one day.

Q. Did you measure, at that time? A. Yes.

Q. Did you do your best to get exact measurements? A. Yes, just as close as I knew how.

Q. And did you report your measurements to Mr. Macri at the time?

A. He was right with us.

Q. And do you have any record of the measurements? A. No, I didn't.

Q. Did you turn any record into the Concrete Construction Company? A. No, sir.

(Testimony of John Klugg.)

Q. Do you have any independent recollection at this time as to those measurements?

A. No, I could not.

Q. What was your function on the job after Mr. Schaefer took it over?

A. I still stayed on the job to build forms.

Q. And after Mr. Schaefer took it over did you have a free hand to build the forms your own way, or did you build them under direction of someone else?

A. No, most of them my own way.

Q. You built them your own way, sir? [2254]

A. Yes.

Q. And I'll ask you whether or not you recall going into the field the first day or two, with Mr. Waltie, I mean the first day or two after they came on the job, with Mr. Waltie and Mr. W. E. Schaefer, for the purpose of trying out the assembling of panels into the form?

A. Yes, I think I was out a couple of days.

Q. And in that connection did they ask you as to how it should be done?

A. Well, I don't remember on that whether they asked me or not.

Q. Do you remember the Mixomobile that was on this job?

A. The which?

Q. The Mixomobile; do you remember the big truck?

A. Yes.

Q. Can you tell me whether or not it was adaptable to this job, whether it was too heavy or too light, or what?

(Testimony of John Klugg.)

A. Well, I wouldn't know about that. I know it's pretty heavy, but it could be used, I know, because it was used there.

Q. Mr. Klugg, from your experience, will you tell me whether or not it is possible to figure the board feet of lumber for the building of forms without knowing the square feet of surface?

A. That would be pretty hard to do. [2255]

Q. Well, would it be practicable, sir?

A. No, not this forms, unless you have plans.

Q. Mr. Klugg, you were subpoenaed by the deputy United States Marshal? A. Yes.

Q. For the defendants Macri? A. Yes.

Q. Now, were you also subpoenaed by the plaintiff Schaefer? A. No.

Q. Sir? A. No.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. I handed you a subpoena last night, did I not, Mr. Klugg?

A. Might be, I don't remember; you might have laid it down there someplace.

Q. Pardon?

A. I don't remember seeing the paper around there, anyhow.

Q. Didn't I just hand you a subpoena last night to be here in court today at 1:30?

A. Might be, at that, but I don't know what I did with that; I didn't see it after.

(Testimony of John Klugg.)

Q. But I did hand you a subpoena?

A. Might did, at that, but I don't know much exactly about that. I was not interested in that.

Q. Well, I not only might have; I did, didn't I?

A. I guess you did, yes.

Mr. Holman: Did you communicate with counsel and tell him I had advised you I would subpoena you now that your work was through?

Mr. Olson: That's objected to as immaterial.

Mr. Holman: Well, I'll withdraw that.

Q. (By Mr. Olson): Mr. Klugg, you say you remember going out on the project with Mr. Macri and Mr. Mercelle, and checking structures?

A. Yes, sir.

Q. And it's a fact, is it not, that you checked only about 10 structures?

A. It is some around near that; I wouldn't say exactly what it is, but it's around in the neighborhood of that.

Q. Would you say it would be not more than 10 structures?

A. Well, I wouldn't say it would be, because we weren't out very long.

Q. Your best judgment is it is not more than 10 structures? A. I don't think it is.

Q. Now, did you see Mr. Macri making any notes while you were there?

A. Well, I don't remember about that. It's quite a while ago. It is three years ago, almost. It's too hard to remember all that. [2257]

(Testimony of John Klugg.)

Q. Now, it's also a fact, is it not, that each of those not to exceed 10 structures that you examined you found were tight and not proper for form setting?

A. Well, not according to the way they were supposed to be, they wasn't. There were some, I think there was some of them right, pretty close to it; of course, I don't know how close, what their agreement was. I wouldn't know what they're supposed to be.

Q. And it's also a fact, is it not, that Mr. Macri after seeing that these structures that you were measuring with him were wrong, he had you discontinue?

Mr. Holman: Just a minute; I object to that question. Counsel is assuming something the witness has not answered.

The Court: Read the question here.

(Whereupon, the reporter read the last previous question.)

The Court: I'll sustain the objection. I think in view of the fact that this witness is subpoenaed by both parties, I don't think that there should be that type of question asked.

Mr. Olson: Well, your Honor, I'm in the same position counsel was when I put on Mr. Black; counsel wasn't restrained in his cross-examination.

The Court: Well, I think this particular question, you're [2258] asking the witness to draw a conclusion there that's hardly justified from what

(Testimony of John Klugg.)

the evidence is so far. You may inquire into what they did, and what Mr. Macri told him.

Q. (By Mr. Olson): Who suggested, if anybody, that you discontinue checking these structures?

A. Well, for one thing, it got late; we wanted to get in. I couldn't tell exactly what happened.

Q. Do you remember whether or not it was Mr. Macri that said "Let's go in"?

A. Well, when it comes right down to saying the truth, I couldn't; it's too long ago, but I think there is something in that, that we got about so many checked and we went in.

Q. Well, now, you say you went out on the field with Mr. Waltie to check the forms against the excavation, on the start of the job?

A. No, I don't think, not that I remember; I went out and helped to set a few of them, to start with, but I don't remember whether we went out to measure that or not.

Q. What you were referring to then was that you took some of the forms out and you helped set some of the first forms?

A. Yes.

Q. And how did you find the first excavations?

A. Well, the ones that I had to set, we had to do too much excavation, and I told this foreman, I think Mr. Schaefer was there, too, I said "I don't like to do the excavating; I want to stay in the shop, because there is too much work."

Q. What took the most time, the excavating, or setting the forms?

(Testimony of John Klugg.)

A. Well, some of them took just about half and half.

Mr. Olson: Did you ask the witness about the lumber? I didn't think counsel did.

The Court: It wasn't gone into.

Mr. Holman: I would like to go into that with this witness, your Honor, if I may.

The Court: All right.

Redirect Examination

By Mr. Holman:

Q. Handing you Exhibit 104-72, with respect to the lumber shown there, can you tell me with reference to this exhibit 104-72 whether or not that lumber that is listed there is lumber that can and would normally be used in building panels for forms? A. Yes, ship-lap and——

The Court: What reference is that?

Q. 104-72, your Honor. Handing you what has been marked plaintiff's Exhibit 104-58, will you inspect the types of lumber on that and tell me whether or not that is such [2260] lumber as can be used in building panels for forms?

A. Well, we used some of this ship-lap, we used, but two by eight, we may use some.

Q. How would you use two by eight?

A. We ripped some of it up for fillets.

Q. Explain how you would rip it up for fillets.

A. We'd make the three by three fillets in the corner, we had to rip this up in order to cut across the corner.

(Testimony of John Klugg.)

Q. Then would two by eight, number 3, common, 4,000 feet, be an excessive amount of that type of lumber for building forms, for the purpose?

A. Well, I don't think so.

Q. And the other items of lumber on 104-58 you recognize as usual?

A. That's the same bill that I looked at?

Q. Yes; the two by sixes also would be used?

A. Yes, we ripped up a lot of different wood that we got.

Q. You ripped up different sizes of lumber?

A. Yes.

Q. Then would you refer to 104, sub-number 65, and tell me whether or not that lumber is all of a type that would be used normally in building panels for forms?

A. Yes, we used that type all the way through.

Q. Thank you; then with reference to—I'm missing some, Mr. Klugg; would you look at 104-73—I didn't notice there [2261] were separate pages numbered here—would you say that was lumber that would be used?

A. Yes, one by eight and two by four.

Q. And then next with reference to 104-66, will you look at that, please, and tell me whether or not that is the type of material?

A. Yes, that's the same I looked at.

Q. Take the second page.

A. That's the same; we used this all the way through.

(Testimony of John Klugg.)

Q. Then look at the third page, 104-67.

A. That's the same type of lumber, and we used that right along, four by four, to put the corners on the boxes.

Q. Now, do you recognize the signature on 104-70, A. E. Mercelle? A. No, I wouldn't.

Q. Do you know who A. E. Mercelle was?

A. Yes.

Q. Who was he?

A. Well, he worked for Concrete Construction, but the signature I wouldn't know.

Q. And your answer would be the same for 104-71? A. Yes.

Q. Will you tell me whether or not A. E. Mercelle was there with you in January, 1945?

A. Well, he was there on the job. [2262]

Q. 104-60, will you tell me whether or not that is lumber of the type that would be used in building panels for forms? A. Yes, I think so.

Q. And 104-61, can you tell me whether or not that would be?

A. Yes, that would be used, just the same.

Q. Do you know who Jim Ellisgren was?

A. No, I don't know the name.

Q. Or Ackley, do you know who he was?

A. No, I don't.

Q. I was referring, your Honor, to 104-62 and 104-64, for signatures. Now, then, directing your attention to 104-9, it has no dimensions on it, but turning to 104-10, will you tell me whether or not you recognize those as quantities that would be—

(Testimony of John Klugg.)

I mean as types of lumber that would be used in building panels for forms?

A. Well, we used two by three by sixteen, we used some of that.

Q. Used some of that, sir?

A. Yes, in different ways.

Q. Well, the quantity is only 360 feet?

A. I know we had some on the job.

Q. And 96 feet; would you say those quantities were reasonable to be used on the job?

A. Well, we hadn't much use for that kind of stuff, but we [2263] ripped them up.

Q. That's 104-10, and would your answer be the same with respect to 104-12, for the two by threes?

A. Yes, we ordered two by three to use.

Q. You ordered two by three? A. Yes.

Q. And your answer would be the same with respect to the two by three for 104-13?

A. Yes.

Q. Then 104-1 has no dimensions on it, has it?

A. No.

Q. All right, will you take 104-2? Do you recognize those items as ones that would be used in your work on the job, three by twelve, fourteen feet long? A. I think it's two by twelve.

Q. No, three by twelve, fourteen feet long.

A. Well, sir, I don't remember that.

Q. Could that be used?

A. I think they used that for runways on the job.

(Testimony of John Klugg.)

Q. Runways on the job, yes, sir; and it is a continuation of the same bill, 104-3—oh, that's a duplicate, is it not, sir? A. Yes.

Q. 104-3 is a duplicate of 104-2, a carbon. 104-4 is a statement only, is it? [2264]

A. Yes, just a statement.

Q. Now, do you recognize the materials shown on 104-5 as materials that were used in preparing forms, panels for forms?

A. Yes, this lumber would be used there.

Q. It could be? A. Yes.

Q. And how about 104-6? A. Yes.

Q. I notice in that there are some rolls of paper; what were they used for, do you know?

A. I really don't remember any more what we used the papers for.

Q. Calling your attention to that date, 3/16/44, can you tell me whether or not that was at or about the time you were working for Mr. Schaefer?

A. Well, I don't remember. I never had much to do with that sort of thing.

Q. All right, sir. And on 104-7, two by four by twelve feet long, would that be normally used?

A. Yes.

Q. And on 104-8?

A. Shingle nails and lath nails.

Q. Oh, those were nails? A. Yes. [2265]

Q. Would those be used?

A. Yes, we used some of them there.

Q. Then 104-15 is a statement only?

A. Yes.

(Testimony of John Klugg.)

Q. And 104-16? A. Yes.

Q. And turn to 104-17, and tell me whether or not you used six bundles of lath, if you recall. Do you remember that? A. I don't remember it.

Q. And who was Mr. Sheffield?

A. Well, sir, I wouldn't know.

Q. You don't remember that name?

A. No. I might know the man.

Q. And 104-18, will you look through that list, please, and tell me whether or not that was material that was used for building forms, panels for forms?

A. Yes, it is all to be used.

Q. And 104-19, building paper, do you recall anything about that? A. No, I don't.

Q. All right, sir; and 104-20, will you look through those dimensions and tell me if there's the same answer as to that?

A. Yes, that's the same. [2266]

Q. That was used?

A. The dimensions were used there.

Q. It's capable of being used? A. Yes.

Q. Then 104-21, what about those dimensions, four by eight and three by ten, eighteen feet long; were those capable of being used?

A. Well, I think they were delivered there, but not that we wanted them.

Q. Well, were they used?

A. I don't know; I think we did rip some of that up.

The Court: Does he mean they rip-sawed it with a hand rip saw?

(Testimony of John Klugg.)

A. No, we had a power rip saw. If we need some lumber we just ripped it up.

Q. Now, then, with reference to 104-22, will you look at those dimensions and tell me whether or not they were capable of being used for panels to go into forms? A. Yes.

Q. 104-23 is a statement only, is it not, Mr. Klugg? A. Yes.

Q. You're used to seeing statements of lumber, are you not? A. Yes.

Q. Now, 104-24, will you look at those dimensions and tell me whether or not they were such as would be used? [2267] A. Yes.

Q. And 104-25? A. That's a duplicate.

Q. Oh, it is a carbon of the other. 104-26, would that be usable? A. Yes.

Q. And 104-27? A. That's a duplicate.

Q. That's a carbon again, is it, sir?

A. Yes.

Q. Do you know some of the yards from which the lumber did come? A. No, I don't.

Q. 104-30 is a statement merely, is it not?

A. Yes.

Q. And 104-31 is a statement merely, is it not?

A. Yes.

Q. 104-32, will you look at those dimensions and tell me whether or not it would be used for building panels for forms?

A. Well, that's stuff we would have to rip up.

Q. You did have to have stuff that you had to rip up?

(Testimony of John Klugg.)

A. Yes, we ordered wide enough, in order to save lumber.

Q. You would rip up other stuff? A. Yes.

Q. 104-33? A. That's a duplicate.

Q. 104-34, will you look at those dimensions, two by four, fourteen feet long?

A. Yes, that's lumber that we used.

Q. And 104-35 is a carbon of that, sir?

A. Yes.

Q. And 104-36, two by four, twelve feet long?

A. Yes.

Q. Would that be the same, sir?

A. Yes, that would be the same.

Q. And 104-37? A. That's another——

Q. Another copy? A. Yes.

Q. 104-38, two by four, sixteen feet long, would your answer be the same for that, sir?

A. Yes; two by six, it is.

Q. Two by six, sixteen feet long? A. Yes.

Q. And 104-39 is a copy of that? A. Yes.

Q. 104-40, two by four? A. Yes, sir.

Q. When you say yes, you mean they would be used for [2269] building panels for forms?

A. Yes.

Q. And 104-41, two by ten?

A. Yes, we used that.

Q. All right, sir. Now, 104-42, 2016 feet of plywood, can you tell me whether or not from your memory there was a substantial quantity of plywood there? A. Yes, we used it quite a bit.

(Testimony of John Klugg.)

Q. What did you use that for?

A. For to line these boxes.

Q. And 104-43 is a carbon of the same?

A. Yes.

Q. And 104-45 is an additional carbon; and 104-46 is an additional carbon?

A. It looks the same.

Q. 104-43 through 46 look like carbons?

A. Yes.

Q. Will you look at 104-47, Mr. Klugg, and tell me whether or not those dimensions were such as would be used as you have indicated? A. Yes.

Q. All right, sir, 104-48, those dimensions, four by eight?

A. That's something we don't use there.

Q. You did not use four by eight?

A. I think we had some on the job, but we didn't use them [2270] only in case we had to.

Q. They were emergent lumber?

A. I don't know how they got there. I think that got there by mistake.

Q. And did you use them, do you recall?

A. We used some of them.

Q. Well, you can't give me the quantity off that bill, anyhow?

A. No, that's pretty hard to do.

Q. And 104-51, you do not know Sheffield?

A. No.

Q. Or Jensen, on 104-52—Jensen is 104-53.

A. No, I wouldn't.

(Testimony of John Klugg.)

Q. Now, will you look at 104-54 as to dimensions and tell me whether or not your answer would be the same as to those?

A. Yes, it would be the same.

Q. Do you know who "H.P.N." is?

A. No, I don't.

Q. All right, sir. Would you look at the dimensions on 104-56 and tell me whether or not your answer would be the same, would those dimensions be used? A. Yes.

Q. What is your answer on that, sir?

A. Most of that would be used there, I guess, far as I can tell. One by six and one by eight, we had to use that right along. [2271]

Q. Yes, sir; 104-78-79-80, you recognize as trucking bills? A. Yes.

Q. And 104-81 you recognize as a trucking bill?

A. Yes.

Q. And 82 and 83. 104-84, who was M. E. Stickney, do you know?

A. Stickney was the superintendent for Mr. Macri.

Q. On that job? A. Yes.

Q. All right, sir. Will you tell me whether or not from time to time as you required lumber for building forms it was purchased or delivered to you from local markets, to you?

A. No—some; most of them come from Seattle, much as I recall.

Q. All right, sir. Will you tell me whether or not, if you recall, lumber was readily available, or difficult to get, at that time?

(Testimony of John Klugg.)

Mr. Olson: Objected to as being immaterial, if the Court please; no proper foundation laid for asking this witness whether lumber was hard to get.

Mr. Holman: My point being, your Honor, on your Honor's ultimate determination of attempted good faith in compliance.

The Court: Well, sustain the objection. I don't think [2272] the foundation has been laid to make this witness an expert on lumber.

Q. (By Mr. Holman): My Klugg, were you customarily handling lumber and currently informed as to the availability of lumber at the time you were working on 1062?

Mr. Olson: Objected to as being leading to the extent he's practically testifying.

The Court: Well, I'll overrule the objection. It is leading.

Q. I'm asking whether or not you knew the general availability of the market for lumber at that time.

A. Well, I know it wasn't so very easy to get, but then most of the time we got it in time; sometimes a little bit late getting there.

Q. Now, will you tell me now, to be responsive to my other question, Mr. Klugg, what was the fact with respect to delivery of lumber to you?

A. I didn't quite get that.

(Whereupon, the reporter read the last previous question.)

(Testimony of John Klugg.)

Q. I want to know about delivery of lumber. Will you tell me that again?

A. Do you mean that it was delivered in time, or——

Q. Yes, what was the fact as to deliveries?

A. Well, that's pretty hard to tell about this lumber, how [2273] it come in there, because we got lumber coming there right along.

Q. There was lumber coming right along; can you tell me whether or not at times lumber was purchased on lists furnished from you, furnished right off, for immediate delivery?

A. No, I did not.

Q. You did not? A. No.

Q. Were you ever required by Mr. Darcy or any of the Concrete Construction Company to make out a list for future delivery?

A. I don't recall that; I didn't make very many lists. Once I did make some, but Mr. Darcy took most of that.

Q. Mr. Darcy was supposed to 'tend to that?

A. Well, he mostly turned in the amount of lumber we wanted.

Q. And would he turn it in to you? A. No.

Q. I'm directing your attention to Macri's Exhibit 85, shown dated July 25, 1944, and will ask you, calling your attention to the chute and the stilling pool designation there, whether or not you recall working with Mr. Darcy on making that, or making up that list yourself?

A. I don't recall it.

(Testimony of John Klugg.)

Q. You do not, sir? Now, can you tell from that list as to [2274] the types of lumber being appropriate for the stilling pool? A. Yes, it is.

Mr. Olson: Well, now, your Honor, it isn't proper, it seems to me, to ask this witness if he can tell from looking at an exhibit whether it would be the type of lumber appropriate to a stilling pool.

The Court: Sustain the objection.

Mr. Holman: Your Honor, the answer should be stricken, too, then.

The Court: I didn't know he had answered.

Mr. Olson: I move the answer be stricken.

The Court: Well, the answer will be stricken.

Q. (By Mr. Holman): And what does S-4 mean? A. Dressed on four sides.

Q. That would be planed on four sides, would it not? A. Yes.

Q. And can you tell me from this identification whether or not there is any flooring on that list, as to dimensions?

A. Well, it isn't specified.

Q. You can't tell off the list?

A. No, you have to specify it.

Q. And in the form building, building panels for forms, were smooth four sides required, or smooth one side only?

A. Well, they mostly wanted size; it didn't make any difference [2275] whether it is all four sides, but it should be sized, for thickness and width; two by four, especially.

Q. That would be smooth on how many sides?

A. Well, it would really only require two edges.

(Testimony of John Klugg.)

Q. Two edges, those should be smooth?

A. Yes.

Q. Well, how would a smooth on four sides be used?

A. Well, that would be the same. It could be dressed on four sides.

Q. Yes, I understand, but in building either a stilling pool or a structure how would smooth on four sides be necessary?

A. Well, it isn't necessary.

Q. Can you tell me whether or not there was any flooring delivered while you were there?

A. Yes, regular flooring, yes; there was some there.

Q. Do you remember the quantities?

A. No, I would not.

Q. And do you remember whether or not there was lumber delivered with four sides smooth?

A. On two by four, yes, and other.

Q. Can you recall whether or not the lumber that was delivered was new lumber, or second hand lumber, or used lumber, or what?

A. We had one bunch right from the start that was used lumber. [2276]

Q. There was one bunch right at the start that was used lumber? A. Yes.

Q. Could you give the Court an estimate of the quantity of that?

A. Well, that's pretty hard to tell.

Q. Did it run into several thousands, or a small amount?

(Testimony of John Klugg.)

A. It might have been a thousand or a couple of thousand; I don't know.

Q. Would you say to the best of your recollection it would not exceed two thousand?

Mr. Olson: That question is objected to as being leading.

The Court: Sustained; he can state.

Q. (By Mr. Holman): Give me the best of your recollection of the quantity, if you can.

A. Well, it might be two thousand feet, but it's hard to tell after that long.

Q. Now, was that delivered when you were working for Mr. Macri, or Mr. Schaefer?

A. Well, sir, I don't even know that.

Q. You can't recall whether it was delivered to Mr. Macri or to Mr. Schaefer? A. No.

Mr. Holman: That's all. [2277]

Recross-Examination

By Mr. Olson:

Q. All two by fours are smooth on four sides, are they not, Mr. Klugg?

A. Not altogether, not all the time.

Q. Well, the general standard two by fours are smooth on all sides?

A. Yes, it's dressed on four sides.

Q. That's the standard type of two by four, isn't it? A. Yes.

Q. Now, what type of lumber or types of lumber as to size and dimensions would you use in making the structure forms on job 1062?

A. Well, we used ship-lap.

(Testimony of John Klugg.)

Q. Ship-lap? A. Yes.

Q. All right. Now that ship-lap would be one by what?

A. One by eight; some narrower, some six, but mostly one by eight.

Q. And some six?

A. We had some one by six, some.

Q. What else would you use?

A. Two by fours.

Q. All right. A. Two by sixes.

Q. What did you use the two by sixes for?

A. We ripped them down to five inches.

Q. I mean without having to go to work on them and make them into something else, what type or size or dimension of lumber would you use in making the forms on 1062, without having to make it into some other size?

Mr. Holman: I object to that question as counsel has limited it, because the witness already stated they used other dimensions besides; now he's asking the question, just using this type only.

The Court: He's asking what types they used without ripping them down. I think that's clear enough. Overruled.

Q. (By Mr. Olson): Do you understand me? Without having to do the ripping, what size lumber would you use? Now, you told me ship-lap and two by four.

A. And four by four we used on that job.

Q. And four by four?

A. Yes, and we used two by six.

(Testimony of John Klugg.)

Q. Well, now, your two by six you had to rip them, to use those?

A. Well, it took two by six to make what we wanted. You couldn't buy what you want. To make five inch we had to have two by six, in order to get five inch, otherwise it is two by five; it had to be full width.

Q. What did you use a two by five for? [2279]

A. Used them as a bulkhead between the two forms. The concrete was five inch thick, and we had to use a two by five just to come in between the two walls; what they call a bulkhead.

Q. All right. Now what other did you use?

A. Well, that's about the biggest part, and we have used different widths to make our moldings out of it, to get our moldings out for the fillet; that's where we had the wider pieces.

Q. Well, now, would you use a three by ten, Mr. Klugg?

A. No, we had no use for it.

Q. Pardon?

A. Not for the form work; we had no use for it, ordinarily.

Q. And how about a four by eight; did you have any use for that?

A. No.

Q. As far as bulding forms are concerned?

A. No.

Q. And your two by eight?

A. Well, that's what we used to rip up to make moldings out of. We ordered them that way, so we would save lumber. We had to have certain widths to make either one or two pieces out of.

(Testimony of John Klugg.)

Q. Two by eight is what you ripped up to make fillets out of? [2280]

A. Makes us two pieces of molding.

Q. Isn't it a fact, Mr. Klugg, that you were continually delayed in your job on account of the slow and non-delivery of lumber for building forms?

A. We was delayed some.

Q. You were delayed continually, were you not?

Mr. Holman: Just a minute. Your Honor, I submit the witness answered the question.

The Court: He did answer that they were delayed some. I'll overrule the objection to the second question.

(Whereupon, written statement of John Klugg was marked plaintiff's Exhibit No. 121 for identification.)

Q. (By Mr. Olson): It is a fact, is it not, Mr. Klugg, that you were continually delayed throughout the time in building forms by reason of not having the lumber available?

A. Well, we was delayed some. We always had to use different lumber, if we was delayed, we just used different lumber to make up what we needed.

Q. What would you do when you ran out of lumber?

A. Well, a few times we took lumber off of other forms that was laying idle; we take it off and use it.

Q. And you had to do that continually throughout the job?

A. Oh, not so continually, but we used it some.

(Testimony of John Klugg.)

Q. What was the condition of the lumber that you were [2281] getting? You said you had one load of used lumber. In what manner was it used—or rather, just describe that used lumber that you referred to.

A. Well, some of it had concrete on it, and some had nails in it.

Q. Some had concrete on it and some had nails in it? A. Yes.

Q. And how about some of the lumber being full of knot holes and dry rot?

A. Well, that's the grade of lumber you get. Some of it was bad, I know.

Q. Showing you plaintiff's identification 121, Mr. Klugg, is that your signature on that?

A. Yes, sir.

Q. Your son-in-law typed that out, did he not, under your direction? A. Yes.

Q. And then you signed it? A. Yes.

Q. This was dated October 24, 1946?

A. Somewhere that time, I guess.

Q. I'll ask you if you did not state at that time in this statement: "We were continually delayed on account of slow and non-delivery of lumber for building forms"?

A. Yes, that's what I put down, but we was delayed some, I [2282] know.

Q. Now, did one load of lumber come that was tongue and groove?

A. We had some tongue and grooved, yes.

(Testimony of John Klugg.)

Q. Was that adaptable to making structure forms?

A. Yes, it is, but it didn't match with our other lumber.

Q. It didn't match with the other lumber that was furnished? A. No.

Q. Did that cause you any trouble or inconvenience or delay?

A. Well, it's just we couldn't use it with the others; we had to make separate panels to use that by itself.

Q. Then I notice the statement in here "Several times we had to strip ship-lap from some of the larger panels to make other panels used right away, then re-sheath those frames when lumber came."

A. I said that.

Q. What did you mean by that? What operation did you go through?

Mr. Hawkins: I object to that question.

The Court: For what reason?

Mr. Hawkins: Counsel is apparently attempting to impeach this witness by this prior inconsistent statement. It seems to me that the proper way to do it is to ask the witness if he did or did not say that at that time. [2283]

The Court: Yes, I think that's a good objection.

Mr. Hawkins: Now, he's asking him to explain something in this identification, that's not in evidence yet.

Q. (By Mr. Olson): Well, I'll ask you if you made the statement "Several times we had to strip

(Testimony of John Klugg.)

ship-lap from some of the larger panels to make other panels used right away, and then re-sheath those panels when lumber came''?

A. I said it.

Q. Now, will you explain what you meant by that?

A. Well, we had to have panels. If the lumber wasn't right exactly there, we took it off the panels that wasn't being used, and repaired the others, what we had to use.

Q. And then when lumber came would you have to put it back on to the other forms from which you had removed it?

A. Yes.

Q. That's what you meant by re-sheath those panels?

A. Yes.

Q. You took the new lumber and put it back on the old panels from which you had taken lumber off before?

A. Yes.

Mr. Olson: We offer plaintiff's identification 121, your Honor.

Mr. Holman: I object to it, your Honor. The witness' testimony has been consistent throughout. We [2284] have not even had a chance to read it yet.

The Court: Let me see it.

Mr. Holman: It's not inconsistent with his testimony, your Honor, as counsel read from it.

The Court: I don't believe it is admissible. He has admitted saying everything that Mr. Olson called his attention to, as I recall it; he admitted saying that in his statement. There is nothing in

(Testimony of John Klugg.)

there contradictory to what his testimony now is.
Sustain the objection.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. Mr. Klugg, when you signed this statement, identification 121, who was there; who was talking to you, do you recall?

A. Yes; there was myself; son-in-law; Mr. Schaefer; Mr. Darcy.

Q. That's M. C. Schaefer and Pat Darcy?

A. Yes. I think there was somebody else there.

Q. Somebody else? A. Yes, sir.

Q. Now, can you tell me whether or not the word "continually" used in that statement was of your adaption, or suggested by them?

Mr. Olson: If your Honor please, if the statement is not going into evidence——

The Court: Well, I'll overrule the objection.

Q. (By Mr. Holman): Did you elicit or volunteer the word "continually"?

Mr. Olson: That question is objected to as being leading and suggestive.

Q. (By Mr. Holman): Well, did you or did you not?

Mr. Olson: Same objection. That's the same question as counsel objected to to me; if he wants to ask him the circumstances——

The Court: I think the proper method is to ask him what he did say, and see how it corresponds to what is in the statement.

(Testimony of John Klugg.)

Q. (By Mr. Holman): Can you tell me what you did say with respect to the word "continually"?

A. Well, on this statement, as much as I know, that is, I make that as close as I could think. I told them what happened there; of course, they know it anyway. We talked that over before. Of course, we did keep there, besides, so I didn't have much time to make it.

Q. You didn't have much time to make a statement?

A. Yes, we had a meeting there without other partners, and we delayed them pretty late.

Q. So the statement was made in a rush of time?

Mr. Olson: That's objected to.

The Court: That's leading. Sustained.

Q. (By Mr. Holman): Did you yourself keep any list of time that [2286] you lost in performance of your duties by reason of any delay of lumber?

A. No.

Q. Was any request ever made upon you by Mr. Darcy or any other superintendent to list your time?

A. Not direct, no.

Q. Did you ever give any notice to either Mr. Staples, Mr. Ashley, Mr. Stickney, or Mr. King as to the amount of time that you had lost?

A. No.

Q. Will you tell me whether or not any complaints were ever made to you by Mr. Darcy or by Mr. Waltie that the forms you were making were incorrect?

Mr. Olson: That's objected to as not being proper redirect examination.

(Testimony of John Klugg.)

The Court: Sustained; not proper redirect.

Q. (By Mr. Holman): This would be a direct question, your Honor, if I may ask it. I'll ask you whether or not in due course of preparing forms, panels for forms, it is usual to bring them back to re-shape them before they go out on the job again?

A. Yes, we had most all come back to the shop and re-assemble and go out.

Q. Is that usual practice? A. Yes. [2287]

Mr. Holman: That's all.

The Court: Do you have a question for Mr. Klugg?

Mr. Hawkins: Yes.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Klugg, Mr. Olson asked you if a two by four planed on all four sides wasn't the standard two by four. Now, I want to ask you if a rough cut two by four is not also a standard piece of lumber?

A. Yes, it is, but it is customary to be dressed on all four sides.

Q. And practically all lumber yards carry both items? A. Yes.

Recross-Examination

By Mr. Olson:

Q. Mr. Klugg, when did you talk with Mr. Macri last, before testifying today?

A. When did I talk to him?

Q. Yes.

(Testimony of John Klugg.)

A. Well, I haven't talked to him only about a week ago, about the only time, and today, he stood down on the sidewalk, he come up to me, we talked, but we didn't talk about this case or anything.

Redirect Examination

By Mr. Holman:

Q. Well, when you talked with Mr. Macri about the case as counsel referred to, a week or so ago, do you remember that occasion? [2288]

A. Oh, we talked about——

Q. I just asked if you remembered the occasion?

A. Yes.

Q. Where did he talk to you?

A. Up at the hotel.

Q. How did you get up there?

A. My bond man, Mr. Lewis, wanted me to come up.

Q. Your bond man, Mr. Lewis? A. Yes.

Q. Did he tell you what they wanted you for?

A. No, they didn't tell me much of anything.

Q. Now, at that time did Mr. Macri say anything to you about paying you any indebtedness he owed you? A. Yes, he mentioned it.

Q. What did he say about it?

A. He said he just forgot about it, or didn't get the bill, or something. I didn't mention much about it.

Q. How long before that has it been since Mr. Macri mentioned paying you that indebtedness?

A. Well, I haven't seen him since I left the job down there.

(Testimony of John Klugg.)

Q. What was the indebtedness for, Mr. Klugg?

A. For a pump that was supposed to be stolen there; what happened, I don't know.

Q. A pump stolen off the job? A. Yes.

Q. It was your pump? A. Yes.

Q. And is it not a fact that in the conference with Mr. Macri that was discussed regardless of any of your testimony?

The Court: That's leading. You've been quite strict in your objection to leading questions, Mr. Holman. I think you should refrain from the same practice yourself, in all fairness.

Mr. Holman: I think that's all. May Mr. Klugg be excused, or do you want to use him?

Mr. Olson: No, he may be excused.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: Your Honor, I am prepared to——

The Court: Well, let's see—is that all of your testimony, Mr. Holman?

Mr. Holman: That is, except the redirect on the examination of Miss Callahan. That was suspended to let counsel go on with his rebuttal testimony while Mr. Klugg was being secured.

The Court: You're not ready to go on with the cross-examination of Miss Callahan?

Mr. Olson: Yes. I thought that counsel was through, though, with Miss Callahan. [2290]

Mr. Holman: On direct.

The Court: He is through with direct, but what he means is that he will have redirect after you finish your cross.

ELIZABETH CALLAHAN

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Olson:

Q. Do you have your copy of Exhibit 91 there, Miss Callahan? A. That's on 1068, is it?

Q. Yes. A. Here it is.

Q. All right; now, referring to item 1 there, labor, that was made up from Macri's identification 21, or the same figures as shown on identification 21, which is a certified copy of a payroll, I think, on 1068?

A. Yes, except it is not the full payroll.

Q. You mean that this is not the—21 is not the full payroll?

A. Oh, yes, 21 is the full payroll.

Q. My question is that your item 1 is made up from this, although it does not include all of it; it is made up from 21? A. Yes.

Q. Now, what items of 21 did you include in your item of [2291] labor, item 1?

A. What items?

Q. Yes; how did you arrive at your item number 1 off of Macri's 21; how did you arrive at that?

A. Well, I get a payroll from the superintendent, that's not complete, you understand; I mean, it has the names and hours, and then I recopy that, keeping one and sending one to the Bureau, and the superintendent has marked the concrete men.

(Testimony of Elizabeth Callahan.)

Q. Well, then, you didn't make it up off of that payroll? A. Yes, it is the same thing.

Q. Well, then, show me, if it is the same thing, what I want to find out. Take any week you want to, and show me where you got the figures to make your \$49,000.00. What I'm getting at is this, Miss Callahan——

A. I'm not sure I understand.

Q. ——your payroll includes the entire payroll for doing all types of work on 1068, doesn't it?

A. Yes.

Q. Now, what I want to know is how could you tell by looking at this payroll what part of it to put in your item 1?

A. You couldn't; you'd have to look at the superintendent's payroll.

Q. In other words, you can't tell by looking at the certified copy of the payroll? [2292]

A. I can tell—the certified copy, no.

Q. You cannot tell by looking at the certified copy of the payroll alone what items to put on your item 1? A. No.

Q. So that in making up item 1, then, you have put down the total of such figures as have been indicated to you by someone else, from some other record other than Macri's 21?

A. It is off the original payroll; is that what you mean?

Q. Well, where did you get it? I understood you to tell me this morning you got it off of the certified copy of the payroll. Now I understand

(Testimony of Elizabeth Callahan.)

you didn't. Now, where did you get the information in your item 1?

A. Off the superintendent's payroll.

Q. Where is that?

A. Now, this is the original payroll in here, in this case.

Q. All right; what laborers did you include, or what classifications did you include in your item 1; can you tell me that?

A. Classifications?

Q. Well, Miss Callaghan, you yourself made up Exhibit 91, did you not?

A. Yes, sir.

Q. All right. Now, in making it up, as I understood you to say, you went over the payroll and took figures off of [2293] that payroll and totalled them to get the figure shown here, item 1, or 91?

A. Yes.

Q. Now, I want to know what classifications or items did you take off of your payroll and total up in item 1?

A. Some of them are carpenters, some of them are carpenter foremen, and some of them are truck drivers, some of them are cement finishers, some of them are concrete laborers, concrete foremen, concrete clean-up.

Q. Concrete clean-up; do you know what this is, or how big an item it is?

A. Oh, it's just along toward the last of the job.

Q. Well, in making your computation, then, you took the laborers and foremen and so forth that had the word "concrete" in front of them; is that

(Testimony of Elizabeth Callahan.)

the designation that indicated to you which ones to take off of the payroll?

A. No; they're marked.

Q. How are they marked?

A. Well, they're marked as they went along.

Q. What mark, what designation? What is there on the payroll that indicated to you that you should charge that up to the concrete work on 1068?

A. Well, there is a red line. I also went through the daily reports. [2294]

Q. Is that the identification, the red mark?

A. Yes.

Q. And was that put on there currently as the payrolls came in?

A. They were usually put on from week to week, as Mr. Burnsted came over after the week.

Q. In other words, Mr. Burnsted would come in to Seattle at the end of the week and bring the payroll with him?

A. No, he mailed it in.

Q. He mailed it in after it was made up?

A. Yes.

Q. And then he came over how much later, after that?

A. Oh, I couldn't say exactly. Mr. Burnsted used to come in quite frequently.

Q. And then he went over the payroll and made a red ring around the labor that was to be charged to that portion of 1068 covered by the Concrete Construction Company sub-contract?

A. That's right, and we checked with the daily reports.

(Testimony of Elizabeth Callahan.)

Q. Could I have that, please?

A. Which do you want?

Q. I want the actual documents from which you made up this item of \$49,000.00——

A. In other words, you want all my payrolls?

Q. Well, I don't know. I want whatever you made it up from. [2295] Now, Miss Callahan, on item 3 of your Exhibit 91 you show the rental of equipment from H. H. Walker, and handing you the folder on item 3, it is a fact, is it not, that that covers the rental on a frame and boom truck, also on a 1941 Ford truck?

A. I would have to tell you by invoice number.

Q. Well, how did you do it when you made up your statement? A. By invoice number.

Q. Can you show me what designation there was to show you whether those trucks were used on the concrete work, or on some other portion of 1068?

A. I asked about them.

Q. Who did you ask?

A. I asked Mr. Burnsted and Mr. Maceri both.

Q. So in making up item 3, then, that figure is based not on the invoices in your possession, but upon information given to you by Mr. Burnsted and Mr. Maceri?

A. Well, they're based on these invoices that they told me to charge to concrete.

Q. Do they include all of the invoices?

A. No.

Q. On trucks? A. No.

(Testimony of Elizabeth Callahan.)

Q. So in making it up, then, you based that on those invoices which Mr. Burnsted and Mr. Macri said should be [2296] charged to the concrete work?

A. That's right.

Q. Now, you yourself in making up the statement, of course, had no personal knowledge and there was nothing on the invoices themselves to indicate where the trucks were used, or for what purpose?

A. I don't believe so.

Q. What folder did I hand you, Miss Callahan?

A. Number 3.

The Clerk: That is number 3 of her designation, but there's another designation at the bottom there, where I've marked it Macri's identification 106.

The Court: The court will recess for ten minutes.

(Short recess.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Now, taking item 5, Martin & Son, ready-mix concrete, \$8,750.00, now, as I understand it, that's the amount that was paid out on a sub-contract?

A. Yes.

Q. Did you actually pay that amount to Martin & Son?

A. The checks he paid him, plus the back charges.

Q. How much did you actually pay him?

A. Well, you have the folder.

(Testimony of Elizabeth Callahan.)

Q. Well, Macri didn't pay him \$8,750.00 did he?

A. I say, that is the amount of the checks plus the back [2297] charges.

Q. Just answer the question, Miss Callahan; Macri and Company did not pay Martin & Son \$8,750.00?

A. Actual checks, you mean?

Q. I'm asking if you paid it to him?

A. Not actual checks, no.

Q. And you actually made back charges or deductions of \$2,273.45 from him, didn't you?

A. I couldn't quote those figures without the statement.

Q. I'll hand you Macri's identification 107, and ask you if it isn't a fact that the amount of money that was paid to Martin & Son was \$8,750.00 less those back charges; can you look at that and tell me how much you did pay Martin & Son? You've got it recapitulated there, have you not, on that yellow sheet?

A. Yes, but it is a little different from what you want. I have his gross earnings here, and the gross due, retained percentage, back charges.

Q. Well, back charges, what do they total?

A. \$2,273.45.

Q. Now, that amount was not included in any checks paid to Martin & Son, was it? In other words, you held that out of Martin & Son's checks, didn't you?

A. Yes.

Q. Yes. Now, handing you part of the same 107, and drawing [2298] your attention to a letter

(Testimony of Elizabeth Callahan.)

dated June 18, 1946, by Macri and Company, I will ask you if there were not some additional deductions made, other than the charge-backs?

A. There is the charge-backs, and the 10 per cent retention, and the penalties listed here; is that what you mean?

Q. Well, here, Miss Callahan. This letter shows there was \$854.21 due Martin & Son after you had deducted \$2,273.45 for charge backs, does it not?

A. Yes.

Q. And did you pay that to them? A. No.

Q. No; and what was the reason you didn't pay him? A. I was instructed not to.

Q. You were instructed not to; so, then, in addition to not paying Martin & Son \$2,273.45, there is also an additional \$854.21 out of this \$8,750.00 that you did not pay Martin & Son; that's true, is it not? A. That's true.

Q. Or a total of \$3,127.66, so that the actual amount of your checks to Martin & Son is \$5,622.34, is that correct? A. I have \$5,622.37.

Q. All right, 37 cents. Now, in addition to that you've billed, have you not, Martin & Son for how much money, referred to on your letter there?

A. Credit balance, Macri & Company—

Q. Yes; how much do you say that Martin & Son owes you now? A. \$7,829.02.

Q. That's about \$2300.00 more than you paid him, isn't it?

A. I haven't figured that out.

(Testimony of Elizabeth Callahan.)

Q. Well, it is approximately \$2300.00 more than you paid him altogether?

A. About that, more than the actual checks.

Q. Now, that statement of the account with Martin & Son is not revealed anywhere on your Exhibit 91, is it, Miss Callahan?

A. Just as gross earnings from the final estimate, is all.

Q. I say, the statement of the figures which I have just questioned you about does not appear anywhere as Exhibit 91?

A. No, just that part of it that's gross earnings.

Q. And part of those charge backs are for labor which Macri performed and which you claim that Martin & Son should have performed, is that true; or do you know what the charge backs are?

A. Oh, I would have to go through that; there are a lot of bills for equipment rental and a lot of different things.

Q. So you don't know what the charge backs are, now, do you?

A. I've been through them. I don't remember them. There's a great many of them.

Q. All right. Has Martin & Son yet paid that bill that you [2300] rendered to them?

A. Not to my knowledge. You would really have to ask Mr. Macri that.

Q. It may have been paid, or may not?

A. As far as I know; I don't think so.

(Testimony of Elizabeth Callahan.)

Q. Now, with reference to your item 6, you made that up from Macri's identification 108, the material contained in that, is that correct?

A. Yes.

Q. Now, would you look at the invoice dated February 28, 1945, Potlatch Yards?

A. Do you have the invoice number?

Q. No. I'll find it for you, though. Here. Now, that item there is included in your compilation, is it not, as a part of item 6 on your Exhibit 91?

A. Yes.

Q. And what does that invoice cover? What does it call for?

Mr. Holman: Would you give us the date, or something, Mr. Olson?

Mr. Olson: I did; February 28, 1945, Potlatch Yards.

Witness: 2090 pounds AEN nut; war tax.

Q. What is that? A. I have no idea.

Q. Well, why did you include it in your compilation, if you [2301] have no idea what it is?

A. Because it is on my list of invoice numbers.

Q. Well, who made up your list of invoice numbers?

A. I did.

Q. Well, why did you include that invoice, if you don't know what it is?

A. Because I was told to.

Q. And who told you to?

A. In this case it was either Mr. Macri or Mr. Burnsted.

(Testimony of Elizabeth Callahan.)

Q. All right; now look at your invoice under April 30, 1945.

The Court: What was the amount of the item your referred to there?

A. \$23.95. April what, please?

Q. April 30, 1945.

A. There are two invoices on that date.

Q. Well, the one that has the nut on it, 1910 pounds BC nut. A. Yes.

Q. \$12.60. A. Yes.

Q. Do you know whether or not that item is coal, nut coal?

A. I don't know; it's on my list.

Q. And do you know whether or not the previous invoice is for nut coal? A. No, I don't.

Q. Why did you include that item in making up your Exhibit [2302] 91?

A. It was given to me to include.

Q. Then isn't it a fact, Miss Callahan, in making up this compilation, 91, you simply put down on it what somebody told you to put down?

A. To some extent, yes.

Q. Handing you folder number 10, which is Macri's 112, Miss Callahan, that is the material from which you made up item 10 on your Exhibit 91, is it not? A. Yes.

Q. Now, that's for Sealeure and freight?

A. Yes.

Q. Total of \$679.76; now, that includes, does it not, the gross bills for those items?

A. Do you mean all the bills in here?

(Testimony of Elizabeth Callahan.)

Q. No; it includes the gross bills for Sealcure and freight, including the barrels that the Sealcure came in? A. Yes, it includes that.

Q. And have you shown anyplace a credit against that account for the barrels returned?

A. Yes, it's taken off in the payment of it.

Q. And can you show me where?

A. These are just the amounts actually paid on these three bills.

Q. But that includes the barrels, for which you get a credit [2303] when they're returned, as shown on the invoices themselves, does it not?

A. If they're returned, yes.

Q. Well, if the invoices themselves, from which you made up your compilation, show a return credit of approximately \$13.00 a barrel, if the barrels are returned—— A. If they are returned.

Q. And you gave no credit, did you?

A. I don't have any credit for them being returned.

Q. So if the barrels were not returned then you still have the barrels, then; or do you know?

A. I wouldn't know whether they're still on the job or not.

Q. At least you gave no credit for the barrels?

A. No.

Q. And each one of these invoices show a return credit coming, and allowable upon return of the barrels? A. If they are returned, yes.

Q. And that shows right on the invoice from which you made up this item?

A. But there is no credit.

(Testimony of Elizabeth Callahan.)

Q. There is no credit shown in that file, at any rate?
A. No.

The Court: Does the invoice indicate how many barrels were involved?
A. Yes. [2304]

Q. Do you have it, Miss Callahan, the number of barrels?

A. On invoice 7374 it is four. On invoice 7373 it is two. On invoice 8131, one. On invoice 575, three. Invoice 3988, two.

Q. How many is this one, now?

A. 3988, two.

Q. That's twelve of them, then?
A. Yes.

Q. Now, your next item, unloading cement from cars and placing on job, Glen Gentry and Harvey Hofsted, \$259.20; now, that item was charged against Martin & Son, was it not, and deducted from them?

A. I don't know whether the whole amount was or not. I'd have to look. Do you have the statement?

Q. Well, handing you Macri's identification 115, and drawing your attention to the notations on the top three sheets upon which is written "Verbal orders don't go; write it"; does not the notation thereon appear to charge that to Sam Martin & Son?

A. Burnsted has written on here "Charge back to Martin & Son."

Q. To charge it to Martin & Son?

A. Yes.

(Testimony of Elizabeth Callahan.)

Q. And you did that, didn't you?

A. I don't know. I'd have to look at the statement and see.

Q. Well, do you know whether or not that was charged back? [2303]

A. Not without looking at the statement. I don't see that amount on it.

Q. Well, drawing your attention to part of your folder 5, part of a letter dated July 26, 1945, being part of Macri's identification 107, do you not have those same items there, \$71.27, which is the same as a charge back against Martin & Son as directed by Sam Burnsted? A. There's \$218.87.

Q. Well, those items I just showed you, Miss Callahan, don't all three of them appear right there as a charge back against Martin & Son?

A. Where.

Q. \$71.27, which is the item you show here, and which is a part of your \$211.51; the next one is \$68.97—do you find that on there? A. No.

Q. The next one is \$71.27. Do you see that on there again? A. There's one on here, yes.

Q. Now, this \$259.20, is that those same items that you charged back against Martin & Son, or do you know?

A. I don't think it is. There is \$602.98 worth here.

Q. Well, do you know whether it is the same or not, Miss Callahan? A. I don't believe it is.

Q. You do not believe it is. Well, did you or did you not [2306] follow the directions that are given

(Testimony of Elizabeth Callahan.)

on here, on part of Macri's 115, to charge that back to Martin & Son?

A. I don't know that I did.

Q. On Macri's 116, would you find the O.P.A. truck value or rental value from which you testified you got item A, on 4?

A. On which I did on which item, or on all of them?

Q. Do you understand, Miss Callahan?

A. On which item?

Q. On subdivision A of item 4, you've got truck rental, 8 months at \$250.00 per month, \$2,000.00, and I understood you got it out of that O.P.A. rent book.

A. No, that is not listed as out of the O.P.A. rent book; the rest of them are. It was my understanding that that is not covered in the O.P.A. book.

Q. So that out of your item of \$2,920.00, there is \$2,000.00 of it that's not based on the O.P.A. rent book, is it?

A. A is not; B and C are.

Q. So that \$2,000.00 out of your \$2,920.20 is not based on an O.P.A. book?

A. That's correct, is isn't covered.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. Will you tell me, please, where the rental for \$2,000.00 on item 4 for the truck was arrived at—how you got that [2307] rate of \$250.00 per month?

(Testimony of Elizabeth Callahan.)

Mr. Olson: Objected to as not being proper re-direct examination, your Honor. The witness testified on direct examination that that rental value was out of an O.P.A. rental book; now she testifies that \$2,000.00 of it was not.

The Court: Overruled. She may explain.

Q. (By Mr. Holman): I would like to understand where you did get it, or do you know?

A. On item 4 as listed on the statement, A is not listed as out of the O.P.A. rental book. I thought that was understood. B and C have the page number.

Q. Where did you get the \$250.00 per month for 8 months to calculate the \$2,000.00?

A. The amount of \$250.00 a month was given to me by our accountant after calling the O.P.A. and several other sources which I could not testify to.

Q. Then you have no basis for the \$250.00 a month, of your own investigation?

A. No; I couldn't find it in the book; it isn't covered.

Q. Do I understand, Miss Callahan, with reference to item 10, that there is a total of 12 barrels listed, and that was \$13.00 a barrel; was the \$13.00 a barrel for returned barrels on the Pioneer Sand & Gravel?

A. Well, there is a credit value for their return.

Q. All I wanted was the amount per barrel. Can you tell me that off of this bill?

A. I think so. I think that depends on the size of the barrel. It's \$6.00 here.

(Testimony of Elizabeth Callahan.)

Q. Well, are these credits?

A. No, because it hasn't been returned. It is a charge for the barrel.

Q. Well, then, the amount of charge there would be the value of the particular barrel?

A. That's right.

Q. Well, each of those that counsel called you has a \$6.00 charge amount, has it not, Miss Callahan? You look them over.

A. Yes, charged \$6.00 a barrel.

Q. Then if the barrels were returned you would get a credit of \$72.00 for the 12 of them, is that correct? A. Yes.

Q. And you have no evidence of any return?

A. No, I don't.

Mr. Holman: Then, your Honor, the defendants Macri are willing and ready to concede there should be a credit there of \$12.00 times 6 (12 times \$6.00) or \$72.00. It's just a correction, certainly.

The Court: Very well.

Q. (By Mr. Holman): With reference to item 5, Martin & Son, the [2309] ready-mix concrete, you say the gross \$8,750.00 was the gross earnings; isn't that what you told counsel?

A. That is correct.

Q. Now, was all of that amount of \$8,750.00 either paid by cash or by charge for credits due Macri and Company on other matters?

Mr. Olson: That question is objected to as being leading.

The Court: Sustained.

(Testimony of Elizabeth Callahan.)

Q. (By Mr. Holman): Well, how was it paid, Miss Callahan? In other words, the \$8,750.00, the amount that Mr. Macri had in this job for performance by Martin & Son—or do you understand?

Mr. Olson: The question is still leading, your Honor.

Mr. Holman: Well, I'm trying to identify that item, your Honor. It may be leading, and I'm not suggesting an answer to her.

Mr. Olson: Well, I'm objecting to the question.

The Court: Well, I think it is still somewhat leading. Can't she explain how she made up that item?

Q. (By Mr. Holman): You have here \$8,750.00, on Exhibit 91, for Martin & Son, and you told counsel that was gross earnings? A. That's right.

Q. And I believe you told counsel you paid ultimately a [2310] check of \$5,622.37, correct?

A. Several checks.

Q. Several checks comprising that?

A. Yes.

Q. Well, what is the difference as to whether or not there was something besides this concrete work, or was it out of the concrete work? In other words, the difference between \$8,750.00, and the \$5,622.37, what is that made up of?

A. Back charges.

Q. Well, what do you mean by back charges, Miss Callahan?

A. Well, I could give you a general idea.

(Testimony of Elizabeth Callahan.)

Q. If you'll do that, please.

A. But the exact picture, I'd have to get my file.

The Court: Suppose we try the general first, and let's see if somebody insists on the particular.

Q. Very well, give the general idea, will you?

A. There are items of charge backs on things that Martin owed us in some cases, rental in some cases, men, in man hours, that we gave them, equipment that we either—when I say equipment I mean small bills that we paid and the foreman forwarded to me to charge back to them; it is a lot of miscellaneous charges, and that come out of the money that we owed them.

Q. Well, then, is this \$8,750.00 a correct amount of what [2311] was paid either by cash or by charge for other matters to Martin & Son?

Mr. Olson: Same objection, your Honor. That certainly is a leading question.

The Court: It is leading, but that's what she testified. Is it a summary.

Q. In other words, what I want to know, Miss Callahan, is whether or not \$8,750.00 is the amount that Martin & Son put into this 1068?

A. Yes, it's his gross earnings.

Mr. Holman: That's all, your Honor.

Recross-Examination

By Mr. Olson:

Q. Miss Callahan, getting back to this same figure, then, on your item 5, is it not a fact that

(Testimony of Elizabeth Callahan.)

\$854.21 of that amount is not a charge back, is not for any services which you claim to have rendered Martin & Son, but is simply the amount of money that you didn't pay him? A. No.

Q. That is not a fact?

A. That is not a fact.

Q. Well, give me item 5 again, then. Drawing your attention to a letter dated June 18, 1946, the item of \$854.21, that letter shows that that amount after all your charge backs is still due Martin & Son, does it not? A. Yes. [2312]

Q. And then you assessed against him a penalty that was assessed against you, Macri and Company, on 1068, and for that reason did not pay him that \$854.21?

A. That is what offsets the \$854.21.

Q. And that wasn't held off because of a charge back for any kind of services rendered?

A. It is charged back right there.

Q. But because you assessed against Martin & Son the entire penalty on 1068 for late performance? A. Oh, no.

Q. The letter shows that you did that, didn't you, Miss Callahan? In that letter you assessed against Martin & Son the entire penalty for late performance on 1068?

A. I couldn't quote you off hand.

Q. What is the amount you charged against Martin & Son? A. \$8,683.23.

Q. That's all assessed against Martin & Son, isn't it? A. It is, in this letter.

(Testimony of Elizabeth Callahan.)

Q. And 854.21 of it has been paid to you by virtue of your holding it out of Martin & Son's money?

A. Well, I don't quite know how you figure that.

Q. Well, were it not for the penalty you would have paid Martin & Son that \$854.21?

A. Yes, but you see, it is subtracted right here.

Q. Yes. [2313]

A. The difference between \$854.21 and \$8,683.23 leaves a balance of \$7,829.02.

Q. So there's been \$854.21 out of the penalty that Macri & Company has been re-imbursed out of Martin & Son's money? Now, just answer that question, isn't that so?

A. That you would have to take up with Mr. Macri. I don't know that it's been completely settled.

Q. Well, Miss Callahan, you're the one that made up this statement, 91? A. Yes.

Q. And you made it up from the records, part of which you now hold in your hands?

A. Yes.

Q. And do not those records show that except for the penalty, even after charging out \$2,273.45 charge backs, Martin & Son, instead, would still have had coming to them \$854.21, isn't that just exactly what that shows?

A. Yes, without the penalty.

Q. And you didn't pay it to him, did you?

A. Didn't.

(Testimony of Elizabeth Callahan.)

Q. And you credited it on the penalty which was assessed against Martin & Son of over \$8,000.00?

A. Yes.

Q. Thank you. Now, these other items, these charge backs of \$2,273.45, and you may wish to refer to this, so I'll [2314] let you keep it, a good deal of that represents labor, you say, that you furnished Martin & Son?

A. I said some of it represented in man hours.

Q. Now, where do those man hours appear on your payroll?

A. I don't think I understand that.

Q. Well, do you know what man hours, what labor it was that was furnished to Martin & Son?

A. Yes, that information was furnished to me, some of it by Mr. Burnsted, some by Mr. Black; some of it is labor, some of it is cash, a lot of different things.

Q. Now, the labor that you charged back against Martin & Son is labor that was furnished right out on the job, is it not?

A. I couldn't say as to that.

Q. And you can't say whether or not that labor you have charged back against Martin & Son is also included in your item 1, could you?

A. Everything in item 1 is concrete work. These other lists were furnished to me by the superintendent. That was between Martin and the superintendent.

Mr. Olson: That's all.

(Testimony of Elizabeth Callahan.)

Redirect Examination

By Mr. Holman:

Q. Miss Callahan, may I understand whether the penalty, \$8,683.23, was paid or deducted from Macri? Was it a cash transaction? [2315]

A. It is deducted from Macri & Company on the estimate, as liquidated damages.

Q. You have no entry of any penalty on 1068 charged to Concrete Construction Company, have you?

Mr. Olson: The question is objected to as being leading.

Mr. Holman: Yes, it speaks for itself. Strike the question.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, Summons, complaint and writ of garnishment, cause No. 381592, King County Superior Court, was marked defendants Goerig & Philp Exhibit No. 122 for identification.)

Mr. Hawkins: Your Honor, while we're pausing here the Clerk tells-me that that summons and complaint Goerig and Philp's Exhibit 2 in case number 257, has not been formally offered or received in evidence in this case. I understood from counsel's remarks that this was to be considered in

evidence, that he wanted this in evidence before he removed his objection to the assignment.

Mr. Holman: I didn't want either in evidence. I said if they went in evidence, they should be together.

The Court: The other has been admitted. [2316]

Mr. Hawkins: And counsel and I thought this had been.

The Court: You offer it now?

Mr. Hawkins: Yes.

The Court: It will be admitted.

(Whereupon, defendants Goerig & Philp Exhibit No. 122 for identification was admitted in evidence.)

Mr. Holman: I'm satisfied the record shows the previous objections.

The Court: Yes, you wish the record to show the same objections you made to the other offer.

Mr. Holman: I rest, your Honor, on the defense and on the cross-complaint on 1068.

The Clerk: I'm just wondering before Mr. Holman did that if I might call his attention to some identifications here, your Honor?

The Court: Yes, all right.

The Clerk: There's a number of identifications here, the payrolls and so forth, that have not been offered in evidence.

Mr. Holman: 54, your Honor, I understood it was made up to show the time of Mr. Stickney complete on the job, as receiving \$1700.00, and I

was under the impression that had been offered and rejected on counsel's [2317] objection. If not, I'll withdraw it.

The Court: All right.

Mr. Holman: Macri's 65 for identification, your Honor, is a communication to Macri and Company from the Shell Oil Company, with bill attached, and that no longer becomes pertinent because of the statements which are involved, so I will withdraw that. Macri's 66 is in exactly the same category, with respect to Central Service Station, and that, under the pre-trial, is no longer in issue.

The Court: You wish to withdraw that, 66?

Mr. Holman: Yes, 66. Macri's identification
73—

The Clerk: Has been rejected.

Mr. Holman: —I understood was a rejected exhibit. I got that from counsel, and I would request at least a copy of that. Macri's 72, I would like to keep in until the very last of the case, to see whether or not there is a photostatic copy furnished as requested from the witness Hunter. As to 78, I would like to call Mr. Schaefer to the stand to identify some handwriting, your Honor.

The Court: All right. [2318]

M. C. SCHAEFER

the plaintiff, recalled for further cross-examination, testified as follows:

Cross-Examination

By Mr. Holman:

Q. Handing you identification 78, will you tell me whether or not the handwriting on the slip attached thereto, and the figures attached thereto, are your handwriting? A. They are.

Q. And is it or is it not a fact that those were the figures you furnished Mr. Macri for the purpose of fixing the items to bid upon under the subcontract on 1068? A. Correct.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: I offer 78 in evidence, your Honor. Your Honor will recall that 78 came from half of the slip upon which the tabulation of 77 came from.

Mr. Olson: Your Honor, I don't see the purpose or the materiality or the competency of identification 78. We have a written contract that was entered into on 1068, which sets forth the values, the amounts per board feet, and there is no inconsistency between them, and I submit that it has no—even if it was inconsistent it could not change the contract.

Mr. Holman: It is offered, your Honor, for probative force in connection with counsel's own

questioning of Mr. Macri as an adverse witness, as part of his case, as to the preparation and the signing of the contract on 1068.

The Court: What is the evidence as to when this was given to Mr. Macri?

Mr. Holman: I have it only that this is the witness' own handwriting.

The Court: I wondered what the testimony showed. I don't remember as to when it was given.

Mr. Holman: It came into the case this way, your Honor; that Mr. Macri brought his slip of paper out upon which showed what is now exhibit 76 (77) upon which he had some tallies on some forms, I think he said it covered [2319] 70 forms, something like that, and that was on a piece of paper folded over, and that was on the other side of that. He testified that those were figures which Mr. Schaefer gave him. Now I'm having Mr. Schaefer identify it.

The Court: Well, I'll overrule the objection and let it in for what it is worth.

(Whereupon, defendant Macri's Exhibit No. 78 for identification was admitted in evidence.)

The Clerk: There were three documents marked and handed to you, Black's daily foreman's report and the structure lay-outs on 1068; in wooden covers.

Mr. Holman: Yes; I would again offer those for the purpose of Macri's 80, daily report of Black throughout 1068, and Macri's 82 for identification

and 81 for identification, which were identified by the witness Black while on the stand as his field operations and his notes throughout 1068. Those were previously offered and objected to by counsel, and I submit they are part of the detail of the proof of performance on 1068.

The Court: Well, there's no question but what Schaefer didn't perform any part of it, and you performed it all, is there?

Mr. Holman: That's correct, your Honor.

The Court: And they don't have any bearing on [2320] the amount of the cost or the amount of damages you claim, do they? Perhaps I'm premature; is there objection?

Mr. Olson: Yes, your Honor. I understand your Honor already rejected the exhibits. We argued at length, and they were rejected, as I remember it.

Mr. Holman: I think not.

The Court: My notes don't show rejected. I'll have to look at them.

Mr. Olson: Am I right, counsel, that those are daily reports made by Mr. Black?

Mr. Holman: It is his diary on job 1068, yes.

Mr. Olson: I object to the document. Assuming that some of the contents might be favorable to them, I don't know that they are, but if they were, it would be a self-serving document, your Honor. It would be hearsay as far as we're concerned.

The Court: Objection will be sustained as to 80. 81 is the lay-out plans on 1068.

Mr. Olson: I don't care if they go in, structure lay-out plans.

The Court: Admitted, then.

(Whereupon, defendant Macri's Exhibit No. 81 for identification was admitted in evidence.)

Mr. Olson: I take it those are Bureau of Reclamation [2321] official plans, Mr. Holman?

Mr. Holman: Yes, Mr. Black I am satisfied so testified and identified them.

The Court: This is marked "Structure lay-out"; is it a duplication?

Mr. Holman: He designated the two as being the set he worked from.

Mr. Olson: Your Honor, I'd have to submit them to someone more competent than myself. I have no objection to an official copy of the structure lay-out plans on 1068 going in, except that I'd like to know that that's what it is.

Mr. Holman: Well, I have only the testimony of the witness Black, your Honor, and except for a historical and graphic explanation of 1068, as to the scope of the work, there would be no object in having them in. At least I want to be in a position of offering them.

The Court: Well, I'll admit them with the reservation that if counsel wishes to have them checked, and on checking them he can raise an objection subsequently if they're not the proper lay-out plans pertaining to 1068.

(Whereupon, defendant Macri's Exhibit No. 82 for identification was admitted in evidence.)

The Clerk: All right, then there is 87, 88 and 89, [2322] three separate sheets, some sort of an invoice that you asked to keep for the time being.

Mr. Holman: Those are withdrawn. 86, your Honor, is the one bearing "S.R.K.," which Mr. Macri testified was the initials of Mr. King, and dated November 20, 1944. Mr. King is not here to testify. 87 is one dated August 3, 1944, and has to do with a number of sacks of cement just being received, I take it, on 1068, and 88 is August 3, 1944, signed by Ashley, with respect to sacks of cement, and those were not produced at the time Mr. Ashley was here, so that I could have those identified by him, and 89 is some tabulations which were withdrawn, or which I will withdraw.

The Clerk: I think that's all so far as the defendant is concerned.

Mr. Holman: Now, on the government exhibits, they were listed right down the line, were they not?

The Clerk: Starting with number 13.

Mr. Holman: Daily reports of inspectors; those are the ones that copies are being made of.

The Clerk: I've got those made up and ready to substitute now.

Mr. Holman: I ask those copies be marked and substituted, your Honor, so that when the originals are [2323] returned, the copies will be here.

The Court: All right, the originals will be released, then.

Mr. Holman: 14, a monthly estimate of progress for compensation.

The Clerk: 14 is in evidence, and copies being made of that.

Mr. Olson: Did your Honor admit 13-a to 13-o; are those admitted?

The Court: Yes.

Mr. Olson: I'm not sure; I wasn't following counsel too closely; are you offering those now?

The Court: No, they have been admitted. He's asking that the copies which the clerk has made be substituted, and that he be permitted to withdraw the originals.

Mr. Holman: 15 is the Macri payroll, and in lieu of that there is one portion of the payroll which has been admitted in evidence as 15-a, so that the Macri payroll so far as the Macris are concerned can be returned.

The Clerk: 16 is Schaefer weekly payroll reports; that's from the Bureau.

Mr. Holman: That's the Schaefer payroll. The same on that. We have not offered that. We had it marked for identification, and we do not offer it. 17, [2324] the monthly control reports, there's been no testimony on that, your Honor, except by Mr. Pease. 18, concrete inspectors' daily reports, XD 1975, is in the same category.

The Clerk: You're asking for those to be withdrawn?

Mr. Holman: Yes, returned to the government, and 19, the daily reports of the inspectors on contract 1068—I'm not sure about that.

The Clerk: It is on specification 1068.

Mr. Holman: That, your Honor, is not offered.

The Court: All right.

Mr. Holman: Monthly estimates of progress for compensation on 1068 is in as Exhibit 20.

The Clerk: With copies being made to substitute.

Mr. Holman: The Macri payroll on 1068 is now offered, your Honor, as part of Macri's case on 1068, in view of the cross-examination by counsel of Miss Callahan as to the items thereof.

Mr. Olson: Your Honor, we object to it on the ground that it is immaterial, irrelevant, on the further ground it is not the document from which the exhibit was made.

Mr. Holman: Oh, this is the government's payroll.

Mr. Olson: It is not the government's payroll; [2325] it is a certified copy of Macri's payroll, furnished the government.

Mr. Holman: It is Macri's 21, produced by Mr. Pease, your Honor, and copies would have to be made.

The Court: If I remember, the cross-examination was on some other payroll that she said showed in some way, marked with a red circle to show they had worked on the concrete work.

Mr. Holman: Yes, but in her testimony she referred to this payroll.

The Court: Yes; it appeared, it seems to me, from her cross-examination, that it wasn't made up from this, but was made from another payroll marked with a red circle. I'll sustain an objection to this. I don't believe it is material.

Mr. Holman: That seems to cover all those items, Mr. LaFramboise.

The Clerk: I believe it does. There is one other item I want to call attention to; that was Macri's identification 55, which was a copy, part of the Macri payroll, that you had Miss Callahan identify as having omitted certain parts of it, excepting for the first page. You took that out to have her recopy it, and when she came back, she had re-copied the whole thing, and it is now marked and admitted as 15-a. [2326]

Mr. Holman: Then I'll withdraw that. In other words, the whole thing is in.

The Court: The defendants Macri rest, then?

Mr. Holman: Yes, your Honor, as defendants and as cross-complainants.

The Court: Yes.

Mr. Hawkins: I wonder if I might check our identifications. I think the two joint venture agreements are in evidence.

The Clerk: That's right.

Mr. Hawkins: The termination agreement is in evidence.

The Clerk: That's right.

Mr. Hawkins: The assignment is in evidence?

The Clerk: That's right.

Mr. Hawkins: And the summons and complaint is in evidence. Then we have no further testimony to offer, and rest at this time.

The Court: Have you anything to offer, Mr. Ivy?

Mr. Ivy: No, your Honor; we rest.

The Court: Would you prefer to go ahead?

Mr. Olson: It is immaterial; we can go ahead.
It is 4:30.

Mr. Holman: I would like to make some offers as against counsel's letters, your Honor, that were introduced [2327] in the testimony of Mr. Schaefer.

The Court: Well, I thought you had rested.

Mr. Holman: Now, this is in rebuttal, your Honor. Mr. Schaefer was called in rebuttal, your Honor will recall that counsel proceeded a little bit on rebuttal, and had some additional identifications marked. I called your Honor's attention to some, and your Honor said I could wait.

The Court: Yes, you've rested your case, and Mr. Olson is going on in rebuttal.

Mr. Holman: He started before Mr. Klugg got here, out of turn.

The Court: But the point is, I don't see why you should make any offers except on cross-examination, until he gets through with his rebuttal.

Mr. Holman: I thought you just wanted to use this five or ten minutes, your Honor. No, that's right.

The Court: If you want to make some offers in connection with cross-examination of a witness, that's all right, but I think you should wait until he gets through.

Mr. Holman: I had only in mind that we had nothing to do.

Mr. Olson: Are we going to stop at 4:30?

The Court: No, I think we'll go until quarter to five. [2328]

M. C. SCHAFER

the plaintiff, recalled as a witness in his own behalf, in further rebuttal, testified as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Schaefer, handing you plaintiff's Exhibit 5, being the sub-contract covering job 1062, I think you testified already that that was signed, or where was it signed, Mr. Schaefer?

Mr. Holman: Object as having been already covered by the witness, your Honor, on the case in chief.

Mr. Olson: I think he did.

Mr. Holman: Both 1062 and 1068.

The Court: I thought he testified to that.

Mr. Olson: I'm just leading up to another question.

The Court: All right, go ahead.

Q. That was signed where? [2329]

A. This was signed at Mr. Macri's residence.

The Court: What is that?

A. 1062, plaintiff's Exhibit 5.

Q. Drawing your attention to the X-d out portion of the typewritten portion of page numbered 1 on the contract, being a part of Article 1, I'll ask you if that was X-d out in your presence?

A. It was not.

Q. Did you see that contract before that portion of it was X-d out, or was that X-d out already when it was presented to you for signing?

(Testimony of M. C. Schaefer.)

A. That was X-d out before I saw it, before——

Q. Before what?

A. Before I saw it; before I signed it.

Q. I didn't get whether you said before you saw, or signed, it.

A. It was X-d out——

Q. Yes.

A. Before I saw or signed the contract.

Q. Did you have any discussion with Mr. Macri concerning the material, or concerning the striking out of that material, at all?

A. No, I did not.

Q. Now, handing you plaintiff's Exhibit 6, I'll ask you whether or not you directed in any particular to Mr. [2330] Hjorth——

Mr. Holman: I object. to this as all having been covered in the case in chief.

The Court: What is this, now, 1068?

Mr. Olson: Yes.

The Court: I'll overrule the objection.

Q. ——to Mr. Hjorth or Mr. Macri any of the particulars of the contents of any of the two sub-contracts, Exhibits 5 or 6?

A. I did not. On this contract here, I filled in the part, wrote the part, that says "If bond is required, general contractor to pay the premium."

Q. Where did you fill that in; where were you?

A. It was at the Stadium Homes job office.

Mr. Holman: Your Honor, I move that that all be stricken as having been covered in plaintiff's case in chief.

The Court: Denied.

(Testimony of M. C. Schaefer.)

Q. Mr. Schaefer, at the time that you signed the contract on 1062 did you advise Mr. Macri that you just wanted a foot clearance in the excavations?

Mr. Holman: Just a minute. I object to that question as exceedingly leading and suggestive, your Honor.

The Court: Well, it is your contention that [2331] that's what Mr. Macri testified?

Mr. Olson: He testified, according to my notes, and I think that's correct, that that's what Mr. Schaefer told him.

The Court: I think you can direct his attention to what was testified. I'll overrule the objection.

Witness: I did not. We had no conversation about the excavating at that time.

Q. Did you at any time make such a statement to Mr. Macri? A. I did not.

Q. Did you at that time, speaking of the time that you signed the contract on 1062, have a discussion with Mr. Macri in which the Mixomobile was discussed, and Mr. Macri said that your Mixomobile was too big? A. There was no such——

Mr. Holman: Just a minute. I submit these are exceedingly leading and improper questions. The way, as I understand it, is if counsel with a witness fixes time, place, and persons present, for the purpose of impeachment, then he can refer to the particular testimony and ask this witness to say whether or not that occurred, but certainly counsel, your Honor, can't frame in his questions his own interpretation of the testimony of the witness, and then have this witness answer yes or no.

(Testimony of M. C. Schaefer.)

The Court: Well, it is an awkward thing to get [2332] at, as you discovered in your examination of some of the witnesses. It is difficult sometimes not to lead. I think if a witness says another one said something, he has a right to say he didn't do it.

Mr. Olson: Yes, your Honor. Counsel went into this at some length and asked his witnesses if they said so and so; Macri said Mr. Schaefer said these things.

Mr. Holman: May it please the Court, in each one of those instances with counsel's witnesses I asked him to fix time and place and persons present.

The Court: Will you read the question?

(Whereupon, the reporter read the last previous question.)

The Court: Overruled.

A. We never discussed the Mixomobile or any equipment at that time.

Q. Did Mr. Macri make such a statement to you?

A. He never did.

Q. Now, did Mr. Macri call you on or about the 14th of June, 1944, by telephone?

A. He did not.

(Whereupon, Schaefer telephone bill for June, 1944, was marked Plaintiff's Exhibit No. 123 for identification.)

Q. Now, showing you plaintiff's identification 123, Mr. [2333] Schaefer, I'll ask you to state what it is.

(Testimony of M. C. Schaefer.)

A. That is a telephone bill, including the toll slip, showing I called to Seattle to Mr. Macri.

Q. Well, does it show to Mr. Macri, or does it show to a number?

A. It shows to a number, and that was on June 14.

Mr. Olson: We offer, your Honor, plaintiff's identification 98 and plaintiff's identification 123, for the purpose of corroborating Mr. Schaefer's testimony that he called Mr. Macri on June 14 and arranged the June 15 meeting, and disproving Mr. Macri's testimony that he called Mr. Schaefer on June 14, 1944.

Mr. Holman: Well, no objection to it going in, your Honor, but not under counsel's statement it proves anything. It does show Mr. Schaefer 'phoned that Seneca number, which was disconnected, it is shown on 98 as disconnected, and that speaks of as now; I don't know about it then, and 123 does show a charge to Mr. Schaefer or to somebody, M. C. Schaefer as talking on June 14 to Seattle, for two calls to Seattle, one of them being that number, being the number shown on 98. If he's offering it as probative of this witness' testimony, I have no objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit [2334] No. 98 for identification was admitted in evidence.

(Whereupon, Plaintiff's Exhibit No. 123 for identification was admitted in evidence.)

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, did you, Mr. Schaefer, in the course of the 'phone conversation with Mr. Macri on June 14, say to Mr. Macri in substance or effect that you would not go back on the job as long as Mr. Staples was on the job? A. I did not.

Q. Or did you in substance or effect say to Mr. Macri at that time that you would not go back on the job until he fired Mr. Staples?

A. I did not.

Q. Did you at any time make in substance and effect either of those statements to Mr. Macri?

A. I did not.

Q. Did you have a conversation with Mr. Macri at some time about Mr. Staples? Just say whether you did or not. A. Well, yes.

Q. Do you know approximately when it was?

A. The one time was June 15, at the June 15 meeting.

Q. And what was said between you and Mr. Macri?

A. The mention of Staples came in there this way: Mr. Macri said "You said Mr. Staples was a good man, and he can't [2335] handle it" to which I said "I've never said anything of the kind, but if he had had a little cooperation from you, I believe he'd have done a whole lot better."

(Testimony of M. C. Schaefer.)

Mr. Holman: Your Honor, I move that be stricken as having been the identical statement the witness made on the case in chief.

The Court: I can't remember that far back, whether he did or not.

Mr. Holman: Your Honor, on defense I asked both Staples and Macri, quoting this gentleman, the statement he's given right now.

The Court: I'll overrule the objection, or deny the motion.

Witness: Pardon me——

The Court: Wait until a question is asked, and then you answer the question.

Direct Examination

(Continued)

By Mr. Olson:

Q. On April 29, 1944, Mr. Schaefer, did Mr. Staples state in substance to you, or did you have a conversation with Mr. Staples on or about April 29, 1944, relative to his calling, or failure to get in touch with Mr. Macri on the previous day?

A. Yes.

Mr. Holman: Just a moment. I object to that as having been covered in the case in chief. [2336]

The Court: It seems to me that these conversations on June 15 and 29th, whatever the date is, that they were fully covered on direct, and I don't believe it is proper for you to go generally into what was said there again, except to call this witness's attention to some specific statement that might have

(Testimony of M. C. Schaefer.)

been attributed to him, and call his attention to that and have him state whether or not he made the statement, but I don't believe you should go into these conversations again, generally.

Mr. Olson: I don't intend to. My recollection is that your Honor on objection of counsel sustained an objection to the witness testifying to this portion of a conversation with Mr. Staples as to his inability to get hold of Macri the previous date, that is, that he could, but Macri told him not to; then when Staples was on the stand I asked him if he had not on that date said to Mr. Schaefer that the previous day he knew how to get hold of Macri, but that Macri had told him not to.

Mr. Holman: I'll withdraw my objection, your Honor. Counsel is explaining his purpose.

Mr. Olson: The purpose of this is to impeach Staples in that statement.

The Court: Go ahead.

Direct Examination

(Continued)

By Mr. Olson:

Q. Did you have a conversation with Staples on the 29th relative [2337] to his ability or disability to get hold of Macri on the 28th? A. I did.

Q. Will you state what it was?

A. After the meeting in the field I met Mr. Staples back at the office, and I asked him what those promises were going to amount to, and relative to this part of it, Staples said "I knew yes-

(Testimony of M. C. Schaefer.)

terday where to reach Mr. Macri, but Mr. Macri told me not to contact him unless I just had to, and when you told me you were going to gather up your equipment at noon today unless he got there, I just had to get in touch with Mr. Macri."

Mr. Holman: I move the answer be stricken as not responsive. Counsel asked him if he had conversation on the 28th; this was on the 29th.

Mr. Olson: No, I asked about the 29th.

The Court: I thought the question pertained to the 29th. I'll overrule the motion to strike.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, did you observe the hoe of Maeri and Company in operation out on the project, 1062? A. I did.

Q. Now, state whether or not it is possible for that hoe to make a vertical cut or bank on that portion of the excavation adjacent to the hoe itself?

Mr. Holman: Just a minute; objected for the reason the witness is not shown qualified.

The Court: Overruled.

A. It is possible.

Q. And would you explain the operation of the hoe in that regard?

A. Might I explain the operation there of excavating that hole?

Q. Well, do that, please.

(Testimony of M. C. Schaefer.)

A. All right. The shovel in reaching out to the far side of the structure dug its teeth in at the approximate line of the stakes which were staked out a foot outside of the neat concrete lines, and pulling dirt toward itself, would pick up and deposit to either side of the structure hole. In getting down into the hole deeper, and the bank next to the shovel, it dug a vertical hole. The hole on the far side from the shovel was not vertical, it was sloped, but the slope was on the inside of the hole lines which would be dug out by hand later.

Q. And after the slope on the inside of the hole lines, as you say, did you see the hole lines later?

A. The hole lines? Yes.

Q. After that slope was excavated out what kind of an excavation did that leave then?

A. That left vertical bank all the way around.

Mr. Holman: Just a minute, please; hoe or hole?

A. Hole.

Q. And did you actually observe the hoe operating?

A. I did; I observed that hoe operating half a dozen different locations.

Q. Is that what you saw there, or not?

A. Yes.

Q. Now, with reference to the Mixomobile operation, it's been stated that that required more men than the transit mixer. Would you state what is the fact in that regard?

A. The fact is it would require at lease one more man to do a comparable job with a transit mixer.

(Testimony of M. C. Schaefer.)

Q. Than what?

A. Than to use a Mixomobile.

Q. And why is that? Just explain it.

A. Because the difference would be that you'd require four transit mixers to the Mixer operator and two dump trucks.

The Court: It's time to adjourn now; we'll take an adjournment until 9:30 tomorrow morning.

(Whereupon the Court took a recess in this cause until Thursday, March 20, 1947, at 9:30 o'clock, a.m.)

Yakima, Washington, March 20, 1947

9:30 A.M.

(All parties present as before, and the trial was resumed.) [2340]

M. C. SCHAEFER

the plaintiff, resumed the witness stand for further testimony in rebuttal, as follows:

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, at adjournment last evening we were just starting to take up the operations of the Mixomobile as compared with the use of transit mixers for the same purpose. Now, I think you al-

(Testimony of M. C. Schaefer.)

ready testified that your Mixomobile operations would not take more men than the transit mixers, and I had just asked you to explain and compare the pouring of cement in structures of this type by the Mixomobile operations as compared with the transit operations, with special reference to the use of manpower.

A. The manpower required with the Mixomobile and the manpower required with the transit mixers, aside of the Mixomobile operator, dump truck drivers, and the drivers on the transit mixers, the rest of the men would be about the same requirement in either operation, but the use of the Mixomobile, you'd operate two dump trucks, hauling three batches, each equivalent to three yards of concrete, each, and they would have loads, there would probably be a load or two at the job site ready to start first thing in the morning, whereas with the transit mixer they'd have to pick up their load at the batching plant the first thing in the morning, and with the Mixomobile the first truck up would dump a batch of aggregate, or the [2341] materials for a batch of concrete, into the hopper, and the hopper deposit it into the mixer, you could dump the second batch into the hopper; that would go into the mixer, and they'd dump their third batch into the hopper and immediately leave for another load.

That's not true with the pre-mix truck. The pre-mix truck has to stay there until every bit of material is deposited in the form, so therefore there is a faster operation. A truck hauling three batches

(Testimony of M. C. Schaefer.)

of concrete materials to the job is not as heavy as a transit mixer, and it will get to the mixer and make a round trip in less time, so it will require four pre-mix trucks to two batch trucks to supply the same amount of concrete.

Q. How about the relative cost of equipment required in the two operations?

A. The cost of the equipment, your mixers, your transit mixers, cost about \$9,000.00 apiece, or \$36,000.00. Your Mixomobile costs \$7,000.00, the two trucks cost about \$5,000.00 for the two of them, then we had a buggymobile on the job for getting to structures that were inaccessible to the mixer for depositing right out of the chute, and which would have involved a whole lot of work on the part of—I'd say, had we used pre-mix trucks; that cost about \$1,500.00. Then we had a water wagon, and that cost about \$2,500.00, so you would have \$16,000.00 as compared [2342] with \$36,000.00 of equipment, and as to the weight of the mixer, your Mixomobile would travel and weigh about 8 ton, where your transit mixers would weigh about 12 ton, and as to maneuverability on the job, your Mixomobile is more mobile on the job than a transit mixer. The Mixomobile is about as mobile on the job as a loaded dump truck. You just pull up to it, back into the location, just as you would with a dump truck.

Q. All right; now, Mr. Schaefer, Mr. Hance seemed to recommend the use of a two-sack mixer as preferable on this type of work——

A. It is not a good mixer to use.

(Testimony of M. C. Schaefer.)

Q. Just a minute.

The Court: Wait until he asks the question.

Q. I will ask you first, do you own such equipment?
A. I do.

Q. And did you own such equipment at the time that you took this contract?
A. I did.

Q. And was that equipment available to put on this work?
A. It would have been, yes.

Q. What piece of equipment did you have?

A. It's a half-yard Jaeger mixer.

Q. Is that the type of mixer that Mr. Hance has described?
A. That's right, it is. [2343]

Q. Did you have that available at the time you went out and bought this Mixomobile?

A. I did.

Q. And the Buggymobile?
A. Yes.

Q. Now, why didn't you use that Jaeger mixer on the job, and explain whether or not it is applicable for use on this job.

A. It is not applicable; while we had, and there aren't many two-sack mixers, as they're called, that have batch, that is, skips for a dump truck to batch it, our mixer does have, that is, the two-sack mixer is so equipped, but in that connection we would perhaps haul a yard and a half of material instead of hauling three yards of material in the same truck, which would duplicate our cost of hauling aggregate; it is not—I don't believe that it would be at all permissible to locate your sand and gravel out on the job in the first place, because you would accumulate dust and you'd get dirty aggregate, de-

(Testimony of M. C. Schaefer.)

positing it on the ground as it would be there, and the top soil, you'd have considerable of the aggregate dusting up in your top soil; there'd be a loss of aggregate, therefore. You'd haul your cement out to the location at the job; it would involve more labor; it would practically double your labor of placing your concrete and weigh batching, to shovel the aggregate, it takes more man power again, shoveling that aggregate into the wheel barrow, wheel it on to this here moveable scale, weighing it, and dumping it into this skip. That's not required when you haul the aggregate out, batching. Our cement is carried in containers that are hinged to the end gate of the truck. You just tip one of these containers over into the skip, you pull the lever and dump your batch of aggregate into the skip, that is, you dump your aggregate and you dump your cement on it, and you just draw it into the mixer. The other way you'd come out, you'd be hauling your aggregate, about the same quantity per load, out to the job site, you'd have the same trucking, practically the same trucking, and you'd have all this additional weighing.

Q. Now, how is this two-sack mixer propelled or moved from one location to another?

A. It takes two good men, or three, to raise the tongue and connect it to a dump truck.

Q. It's not self-propelled?

A. It's not self-propelled, and then to tow that piece of equipment back of a dump truck, it isn't like towing it out on a highway.

(Testimony of M. C. Schaefer.)

Q. How many wheels are on a two-sack mixer?

A. Two wheels. [2345]

Q. By the way, Mr. Schaefer, how long do you mix the aggregate in the mixer before it can be poured?

A. Well, in this case here, why, we probably mixed it longer. The requirement on a two-yard mixer is two minutes.

Q. Two minutes? A. That's right.

Q. Now, Mr. Schaefer, did you have a conversation with Mr. Verne Ashley at his office in Coeur d'Alene, Idaho, on or about October 26, 1944?

A. I did.

Q. And who was present?

A. There was Verne Ashley, Pat Darcy, Verne Ashley's son, young son, and he was there for a short time, and myself.

Q. And did you discuss 1062 at that time?

A. We did.

Q. Would you state the nature of that conversation?

Mr. Holman: Just a minute, your Honor, I object to that unless the witness's attention is directed to the statements of Mr. Ashley which counsel interrogated Mr. Ashley on. In other words, now he's asking him to state the nature of the conversation. I submit that's not proper rebuttal.

Mr. Olson: I'll direct his attention. I understood counsel objected to that yesterday.

Mr. Holman: Counsel has not misunderstood me, [2346] your Honor. Where there is a time,

(Testimony of M. C. Schaefer.)

place and person fixed, then the substance of the conversation is a proper matter of inquiry.

The Court: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, at that time did Mr. Ashley state in substance or effect that running the 1062 for Mr. Schaefer was a two man job?

A. For Mr. Macri?

Q. Yes, for Mr. Macri, was a two man job?

A. He did.

Q. Can you relate in substance the statement made by Mr. Ashley in that regard?

Mr. Holman: Just a minute. Your Honor, I object to the witness using notes on this. This is a test of memory.

The Court: Well, I think he should state his best recollection on it, yes.

Witness: Mr. Ashley said that that job was a two man job, and that he had asked Mr. Staples to stay on. Mr. Staples said——

Mr. Holman: Just a minute. Your Honor, I submit that is not binding on Mr. Macri, as this is at the end of the job, and this witness and Mr. Ashley purport to give a conversation between Ashley and Staples [2347]

The Court: As I understand, this is in the nature of impeachment of Mr. Ashley. He stated he didn't make these statements. Is that the purpose of it?

Mr. Olson: Yes.

(Testimony of M. C. Schaefer.)

Mr. Holman: Well, then, I withdraw my objection, your Honor.

Witness continuing: ——and Mr. Staples said “Well, that’s all right with me if you can fix it up that way with Mr. Macri,” then Staples did stay on there for a short time, and Macri——

Mr. Holman: I submit, your Honor, that that is not conversation the witness now is testifying.

Q. Did Mr. Ashley say that? A. Yes.

Mr. Holman: Pardon me.

Witness continuing: ——and then Ashley said that Macri called him when the payroll went in, and asked him why Staples was on the job, and Mr. Ashley said “I still need Staples till I learn more about the job” and Mr. Macri said “Well, you better learn fast; Staples has got to get off the job.”

Q. Now, Mr. Schaefer, the notes which you had in your hand, when were they made?

A. They were made right after we left Ashley’s office, and within two blocks of the office. [2348]

The Court: You mean at the time of the conversation, or shortly after?

A. The time of the conversation.

The Court: I think if that’s the case you may use your notes to refresh your memory.

Mr. Olson: I don’t think the witness really needs them, your Honor.

The Court: Well, it’s proper to use them if they are made on or about the time.

(Testimony of M. C. Schaefer.)

Mr. Olson: In view of the remark that went into the record I wanted to explain that.

The Court: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, at that same conversation in Coeur d'Alene with Mr. Ashley, on that date, did Mr. Ashley say in substance or effect, in reply to a question asked by Mr. Darcy, that his blow up with Mr. Macri resulted from there not being sufficient lumber, no effort on the part of Mr. Macri to get lumber, not sufficient manpower, and Macri's refusal to pay wages sufficient to get manpower, and lack of sufficient equipment, and Macri's refusal to furnish additional equipment?

Mr. Hawkins: Your Honor, I object to that question because, as I recall Mr. Ashley's testimony his answer to that question was merely that there was no [2349] blow up between him and Mr. Macri.

The Court: It is my recollection that he denied, in effect, making the statement. I'll overrule the objection.

Witness: Pat Darcy asked Mr. Ashley——

Q. Was there such a conversation?

A. Yes.

Q. Would you state what Mr. Darcy said to Mr. Ashley and Mr. Ashley's reply, with reference to the subject matter of my previous question?

(Testimony of M. C. Schaefer.)

A. Mr. Darcy asked Mr. Ashley "What led up to your blow-up with Macri?" and then Mr. Ashley said "Well, my blow-up came because Macri refused to pay enough for help, and the labor is not competent to lay out structures." He said "That takes another man; that's why Staples and I should have been permitted to stay on that job."

Mr. Holman: Now, your Honor, in view of the witness' present statement I move his answer to the last question be stricken as inconsistent.

The Court: In what way?

Mr. Holman: Well, lumber and insufficient men as the reasons. Now he's given a different reason.

The Court: Well, I'll deny the motion to strike. I think it goes to weight rather than competency.

Q. Had you finished the conversation? [2350]

A. No, I did not. That he didn't have enough good help——

Mr. Hawkins: Your Honor, I call your attention to the fact that the witness is reading from his notes.

The Court: Just refresh your memory.

Witness: I'll lay them away.

Mr. Hawkins: He's looking at them all the time. I don't know whether he's reading or not; he gives every evidence of it.

Q. Give it from memory.

A. He said that because of not having lumber, refusal to send lumber in when required, because of the equipment, they didn't have equipment to get men around from structure to structure for the fine

(Testimony of M. C. Schaefer.)

grading, if they did have the men. Macri refused to supply additional equipment or men or lumber.

Q. Now, Mr. Schaefer, Mr. Hance testified that the entire excavations, or the entire cubic yardage of structure excavation as shown by the final estimate, these structures could be excavated by hand at a total cost of \$11,250.00. State whether or not that is so.

A. It could not be done for that.

Q. Could it have been done for that price in 1944? A. It could not.

Q. Would you explain what, in your opinion, it would cost to hand excavate those structures, I mean entirely by [2351] hand?

A. Hand excavating those structures, to lay them out, to do the fine grading, and the excavating, would take not less than $3\frac{1}{2}$ man hours per cubic yard.

Q. And what rate of pay would it cost per man hour for that type of work in 1944?

A. I wouldn't be able to say just what the rate was right then; I think it was a dollar an hour, but you'd have the insurance and taxes, too, labor tax. If the total was a dollar, it would be \$3.50 a yard.

Q. Well, now, Mr. Schaefer, in giving that number of man hours per cubic yard, what type of soil digging are you taking into consideration?

A. I'm taking into consideration the soil right out on that project, and the conditions as I saw them.

(Testimony of M. C. Schaefer.)

Q. What with reference to the soil being frozen?

A. No, this here would be on a basis of no frost.

Q. Now, do you recall getting a notice from Mr. Macri to proceed with 1068? A. Yes.

Q. And also the notice of January 3, I believe, 1945, declaring that you were in default?

A. I did.

Q. Now, during that intervening period did the Concrete Construction Company have forms available to use in the [2352] performance of 1068, if structure excavations had been available?

Mr. Holman: Just a minute. Your Honor, I object to that question as not being proper rebuttal. This witness went into the whole thing in his case in chief.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: I think it was covered in his direct.

Mr. Olson: Your Honor, my purpose in it is defensive to their cross-complaint. We did put in testimony that showed that the hand excavation—that there were no excavations ready until February 5, and that prior to that time that Macri and Company had taken over the building of forms, but there has been an inference in Mr. Macri's case, an inference only, that we should have started the form making before the excavations were ready, and it's to meet that that I offer to show this.

The Court: Mr. Holman?

(Testimony of M. C. Schaefer.)

Mr. Holman: Well, of course, I don't want to deprive them of proper rebuttal, your Honor, but the mere reiteration of the case in chief I think is improper. It was part of their case in chief, your Honor, because they are suing for \$5,000.00 for breach of this contract, and they made their proof, and we met it, and [2353] this gentleman himself testified, he even testified the dates he was on there.

The Court: You have two sides of this. You have your cross-complaint for your damages for Schaefer's breach of this contract, and you were going forward in direct, really, when you made your case on that phase of it, and it seems to be undisputed that there wasn't any excavations ready for pouring of concrete at the time that Macri gave notice of cancellation of that contract, so that if Schaefer breached, it would be by way of failure to make preliminary preparations.

Mr. Olson: Will you read the question?

(Whereupon, the reporter read the last previous question.)

Witness: Yes, we did.

Q. And those were from what source, Mr. Schaefer?

A. They were from the job 1062.

Q. Now, there's been certain checks, I guess what is in evidence now is the carbon copies of the checks, and the vouchers, indicating payment to the Concrete Construction Company, Mr. Schaefer, par-

(Testimony of M. C. Schaefer.)

ticularly Macri's Exhibit 99. I'll ask you why those checks were cashed if you had an agreement with Mr. Macri to pay you your actual costs?

Mr. Holman: That I submit, your Honor, is not a proper question. It's based on an assumption. He's [2354] asking this witness now why he did something in view of the fact that he claimed he had an agreement——

The Court: I'll overrule the objection. He can explain.

Witness: These here were based on the engineer's estimate, and we could not submit a bill for our additional costs until the end of the job.

Mr. Olson: These are not all of the payments, are they, Mr. Holman? You didn't put in the copies of the checks that had no vouchers on them?

Mr. Holman: These are all the checks that had vouchers.

Mr. Olson: You didn't put in the copies of the checks that had no vouchers?

Mr. Holman: No, I didn't have vouchers every time. There were separate checks sent with those; you cashed the checks. Mr. Olson, and your Honor, with respect to these payments, Mr. Hendershott had given all the payments, and I understood that would not become an issue here, and therefore I did not make complete proof on that.

Mr. Olson: Do you have the checks issued subsequent to the checks shown in Exhibit 99, which do not have vouchers attached to them?

(Testimony of M. C. Schaefer.)

Mr. Holman: I had them, brought them, and submitted [2355] them to you, and I'll have to look them up again now. You requested them, and I brought them over.

Mr. Olson: You say you submitted them to me? Well, Mr. Schaefer, were all of the payments made to you by the Macri and Company voucher form checks of the type shown on Macri's Exhibit 99?

Witness: No.

Mr. Olson: You don't have those copies of those checks with you in court now, Mr. Holman?

Mr. Holman: Mr. Olson, I don't know. I'll just have to look. I had them and delivered them to you.

The Court: As I understand it, this has been said many times here, but the amount of payments has been settled by the pre-trial conference, and it is also undisputed, is it not, that payments were made in two instances without a voucher attached?

Mr. Holman: Yes, your Honor, because they ran out of those checks.

The Court: Was there anything you wanted particularly?

Mr. Olson: Simply that the two checks are in considerable, sizable amount, and they are the last payments that were made to the Concerte Construction Company.

The Court: Without the attached vouchers?

Mr. Olson: Without the attached vouchers.

The Court: Can you stipulate as to the approximate amount of the checks?

(Testimony of M. C. Schaefer.)

Mr. Holman: We have Mr. Hendershott's compilation, your Honor. By checking those off it will give the other checks, that's all.

The Court: If you wanted to show the date and amount, that would be all that is material from your standpoint, Mr. Olson?

Mr. Olson: Yes.

The Court: I wonder if we couldn't stipulate to that?

Mr. Olson: There was one check in the amount of \$2985.46, issued in March, 1945, I do not have the exact day in March, and the second check is for \$7050.50, issued in April, 1945, neither of which were voucher checks.

Mr. Holman: Now, if I could have just a second with counsel here, your Honor, it will save a lot of time.

The Court: All right.

Mr. Holman: I found what counsel says is correct, and I so stipulate, your Honor, that those checks were sent with vouchers attached, but not part of the check.

Mr. Olson: They were what, you say?

Mr. Holman: They were just a check with the statement attached, that's our testimony.

The Court: I don't know whether counsel is willing to stipulate as to the statement attached, but you will stipulate there was no voucher form attached to the check?

Mr. Holman: I stipulate there was a separate voucher form attached to the checks, and I call on counsel to produce those checks.

(Testimony of M. C. Schaefer.)

The Court: Well, perhaps you had better produce the checks, then, if you can't get together on it.

Mr. Olson: Your Honor, that's all of my questioning, with that exception.

The Court: All right.

Mr. Holman: Your Honor, it's going to take some time to find those checks themselves.

The Court: All right; can you proceed with the cross-examination in the meantime?

Mr. Holman: I would like to have marked for identification the following communications: A letter and registered envelope from the Concrete Construction Company to Macri and Company dated December 5, 1944, and I'll ask the clerk to remove the pencil notations from that. That's a letter from the Concrete Construction Company to Mr. Macri.

(Whereupon, Letter Schaefer to [2358] Macri dated December 5, 1944, was marked Defendant Macri's Exhibit No. 124 for identification.)

Mr. Holman: I call for the production of the original of letter of January 25, 1945, to the Concrete Construction Company from H. T. Nelson, Construction Engineer, showing copy to Macri and Company.

Mr. Olson: I think it's in evidence as an exhibit.

The Clerk: It is Exhibit 37.

Mr. Olson: And that's our original that we produced.

(Testimony of M. C. Schaefer.)

Mr. Holman: I call for the original of letter of January 27, 1945, to Concrete Construction Company from Macri and Company.

The Clerk: That's in evidence as Macri's Exhibit 38.

Mr. Holman: I call for the original of the letter of July 23, 1945, to the Concrete Construction Company from Macri and Company.

Mr. Olson: May I see the copy?

Mr. Holman: You referred to it during the trial.

The Court: Isn't that the one that Mr. Schaefer testified he never received?

Mr. Holman: No, the one in September. [2359]

The Court: That's the one Mr. Schaefer testified he never received, so you may make your demand, all right, but he testified he didn't get it.

Mr. Holman: I thought he said September; that's July.

Mr. Olson: Well, the one you put in evidence sent a corrected statement, and then I asked him if he had received any other statement of which that one might have been a correction, and he said he did not.

The Court: The heading reads the same as the other one. I remember the other was not a carbon copy, but a typed copy.

Mr. Holman: There was a carbon copy substituted later, but the heading of the September letter read "corrected."

The Court: What is your statement to his demand for the original of that?

(Testimony of M. C. Schaefer.)

Mr. Olson: We do not have it, as Mr. Schaefer testified he never received either one of them.

The Court: All right.

Mr. Holman: I would like to have marked the letter of August 3, to myself from W. R. McKelvey, and the copy of letter of July 31 referred to therein.

The Court: Do you want them marked together, or separately? [2360]

Mr. Holman: They should be one.

(Whereupon, Letter Schaefer to Macri dated July 31, 1945, was marked Defendant Macri's Exhibit No. 125 for identification, and letter McKelvey to Holman dated August 3, 1945, was marked Defendant Macri's Exhibit No. 125a for identification.)

Mr. Holman: I would like to have the original of letter to W. R. McKelvey from our firm of March 14, 1945.

The Court: Is that a letter written to Mr. McKelvey?

Mr. Olson: Yes; I don't have the original.

The Court: Do you have Mr. McKelvey's file?

Mr. Olson: No, I do not.

Mr. Holman: There's other correspondence, your Honor, but it pertains to the payment of these claims covered by the second set of vouchers, and I don't think that's sufficiently established.

The Court: You mean the two checks that had no vouchers attached?

(Testimony of M. C. Schaefer.)

Mr. Holman: No, pertains to these payments, this second set of check vouchers that were for payment of claims against Mr. Schaefer, exhibit 100.

The Court: Yes, I remember that.

(Whereupon, copy of letter Holman to McKelvey dated March 14, 1945, was marked Defendant [2361] Macri's Exhibit No. 126 for identification.)

Cross-Examination

By Mr. Holman:

Q. Handing you what has been marked Macri's 124 for identification, is that your signature, and did you send that letter by registered mail as shown by the envelope attached; look at the envelope, please, to Macri and Company? A. I did.

Mr. Holman: This is offered in evidence, your Honor.

Mr. Olson: Your Honor, we object to it as being irrelevant, incompetent and immaterial, and does not serve any issue in this case, and is not proper cross-examination of rebuttal testimony of Mr. Schaefer. It is a letter relating to the appointment of an arbitrator. Arbitration is out of the case by pre-trial order.

Mr. Holman: The matter of arbitration is out, that's true, but this is the forerunner of the conversation this witness detailed on rebuttal, in my office, with respect to that, and shows the relation-

(Testimony of M. C. Schaefer.)

ship between the parties as of that day, and whether or not they were standing on the sub-contract or waiving it.

Mr. Olson: It is not proper cross-examination in rebuttal. [2362]

The Court: It seems to me that is material, but I don't think it is proper cross-examination. This witness didn't go into the matter of arbitration.

Mr. Holman: No, your Honor, but I submit that it is material in view of the witness' statements.

The Court: What statements?

Mr. Holman: On rebuttal testimony as to the meeting in my office.

The Court: Well, this has nothing to do with the meeting in your office.

Mr. Holman: It preceded it, and fixed the relationship of the parties.

The Court: I don't remember he testified anything about arbitration in your office, or any conversation about arbitration.

Mr. Holman: No, sir.

The Court: He said there was some meeting up there in an effort to settle. Well, I think it would be material as your surrebuttal anyway, so I don't think the order in which it goes in is material. I'll overrule the objection, and admit it.

(Whereupon, Defendant Macri's Exhibit No. 124 for identification was admitted in evidence.)

(Testimony of M. C. Schaefer.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, handing you what has been marked identification [2363] 125a, a communication of August 3, 1945, addressed to me and sent by Mr. McKelvey, and referring to a letter of July 31 from the Concrete Construction Company, and referring then to Macri's 125, a carbon of that letter, can you tell me whether or not you did send the original of 125? A. Yes.

Mr. Holman: I offer that in evidence, your Honor.

The Court: Will you offer both of those?

Mr. Holman: Well, the way they're attached here, your Honor, 125a is the transmittal letter to me from Mr. McKelvey, and 125 itself is the copy of the letter he admits, the witness, himself, has said he sent it.

Witness: I don't say that I received a copy of that from Mr. McKelvey.

Mr. Holman: That isn't what I asked you. I asked if you sent that to Mr. McKelvey to transmit to me.

Witness: Yes.

Mr. Holman: May I proceed, your Honor?

The Court: Well, wait for counsel. I think you've offered this, haven't you. Mr. Olson, do you have an objection to the offer of identification 125?

(Testimony of M. C. Schaefer.)

Mr. Olson: I've got no particular objection, your Honor. The whole contents of it are admitted, that those payments were made and credited.

The Court: Well, it seems to me that it is probably immaterial, but if you have no objection to it I'll let it in. There's no question but what Mr. Schaefer authorized the payment of these sums, is there?

Mr. Holman: No, there's no question about that, but there is a question as to when Mr. Schaefer claimed for the first time that the contract had been broken.

The Court: As I understood it, the vouchers were admitted here for the purpose of showing, or tending to show, that the parties were continuing to deal under the sub-contract. Now, this order of payment is equally consistent with the existence or continued existence of the sub-contract, and with the existence of the oral contract. It is as consistent with one as with the other, but it doesn't seem to me it has any evidentiary value. Do you want it in?

Mr. Olson: I just don't care a bit. I think it doesn't add a thing except another numbered exhibit.

The Court: Well, it will be admitted.

(Whereupon, Defendant Maeri's Exhibits Nos. 125 and 125a for identification were admitted in evidence.)

(Testimony of M. C. Schaefer.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. Mr. Schaefer, I am calling your attention to identification [2365] 126, a communication to Mr. McKelvey at Seattle from me, of March 14, and directing your attention particularly to the last paragraph of the first page of that, I'll ask you if Mr. McKelvey communicated the contents of that letter, and particularly that paragraph, to you? In the first place, did he send you a copy of the letter, Mr. Schaefer?

A. I couldn't say that until after I read it.

Q. Very well, sir.

A. I wouldn't say that I received that letter. If I did it's in my file. There was some conversation with Mr. McKelvey, I had conversation with Mr. McKelvey about it.

Mr. Holman: I offer this in evidence, your Honor.

Mr. Olson: Your Honor——

The Court: I don't believe that's a proper foundation for the introduction of the document.

Mr. Holman: Will you look in yor file and see if you have a copy of that document?

Mr. Olson: I do have a copy.

Mr. Holman: May I have the copy?

Mr. Olson: I don't know that it is necessary. It is undoubtedly like yours.

(Testimony of M. C. Schaefer.)

The Court: Well, let's see it.

Mr. Holman: Mr. Schaefer said in his file. Are you referring to Mr. Schaefer's file? [2366]

Mr. Olson: I'm referring to Harry L. Olson's file. Your Honor, that letter was one Mr. Holman wrote with considerable foresight, undoubtedly written for just the purpose of introducing it into evidence. At least it reads that way to me. It is a very polished and well-written letter, and Mr. Holman is to be complimented on his choice of language, but I do object to the letter going into evidence in this case as any evidence against anybody. It is purely self-serving, everything in it.

Mr. Holman: All that counsel says is correct except the beauty of the letter. It is a self-serving document, necessarily, but it is a part of the same correspondence, and states and binds Mr. Macri as to position.

The Court: It seems to me that we've gone far enough afield in going into the details of this attempted settlement and arbitration. After all, it has only value to show whether or not the parties were still dealing with reference to the sub-contract. It seems to me it is too far afield to have a copy of a letter from Mr. Macri's attorney to Mr. Schaefer's attorney, and I'll sustain the objection.

(Whereupon, Defendant Macri's Exhibit No. 126 for identification was rejected.)

(Testimony of M. C. Schaefer.)

Cross-Examination
(Continued)

By Mr. Holman: [2367]

Q. Mr. Schaefer, did you at any time prior to June 14, 1944, have any telephone conversation with Mr. Macri other than the one you've indicated on your exhibit, your telephone slip?

A. Prior to June by telephone?

Q. Prior to June 14, sir.

A. I've had conversation with Mr. Macri.

Q. Yes, you did have conversation with Mr. Macri prior to June 14, did you not?

A. By 'phone, yes.

Q. And do you have your slips to show that you made all those calls, or not?

A. Well, there are some of the slips that I do not have. I believe I have the majority of my 'phone slips.

Q. Now, is it or is it not a fact that Mr. Macri never called you?

A. That Macri never called me?

Q. Is that a fact, or is it not a fact?

A. I would say if Mr. Macri called me, he called me after I had called him, or returned my call.

Q. Might it be that you called Macri and didn't get him and left your number for him to call?

A. I've done that.

Q. That's happened, has it not, sir?

A. And I wouldn't swear that he called me back on any of [2368] those calls, either, because it was

(Testimony of M. C. Schaefer.)

generally the case where I've called two or three places, and then perhaps called him again the next day or two days later. That was more apt the case than that he returned my call.

Q. Well, you still wouldn't swear one way or the other?

A. I still wouldn't swear that Macri has ever called me.

Q. Or you wouldn't swear that he has not called you?

A. No, I wouldn't.

Q. All right, sir. With respect to your Mixmobile, Mr. Schaefer, were not present when your brother testified, or maybe you testified, that when the tower was taken off, that you had made two chutes of 30 feet in length, and there's a bill item for it in your statement, correct?

A. Two chutes of 30 feet?

Q. Yes.

A. I don't believe our chutes are 30 feet long.

Q. Well, anyway, metal chutes?

A. I don't believe those chutes are 30 feet long.

Q. Well, let's put it this way, a total of 30 feet of chutes, in metal?

A. Yes, we have two chutes.

Q. Now, if the Mixomobile could be backed right up to the form, why did you need those chutes?

A. Well, the first type of chute used was a brake type of [2369] chute.

Q. Talking about the tower, now?

A. Well, I believe that was one that was used right after we removed the tower.

Q. All right.

(Testimony of M. C. Schaefer.)

A. I wouldn't say that we didn't use it with the tower, either.

Q. Well, will you answer my question? Why, if you could back right up to dump concrete into a form direct from the Mixomobile, did you need a chute that long?

A. How long are you stating now that that chute is, 30 feet? I don't believe it was 30 feet long.

Q. No, I understood you had two of them, and I thought 30 feet for the two of them I think was the answer.

A. Well, it may be that the two of them if they were butted end to end would have made 30 feet, but the first chute was a broken type chute; it wasn't as adjustable as the chute we later used.

Q. Now, the first type chute was the one you used with the tower, right?

A. I believe we used that with the tower.

Q. Yes, sir. May I have 49? And the picture, 49-1, shows the chute attached and using the tower, does it not?

A. That's right.

Q. In which you elevated the material up the ladder, or up [2370] the tower, and then dropped it rather straight, quite an acute angle, down into the form, correct?

A. That's right.

Q. Now then, will you turn to 49-35 and 49-36? Those are operations by the chute after the tower had been removed?

A. That's right.

Q. And those chutes which are shown there are the chutes about which I interrogated you?

A. I believe we have a picture in here where the chute would show a little more prominently.

(Testimony of M. C. Schaefer.)

Q. Well, would you answer me whether or not you can recognize those chutes?

A. That's a chute, yes.

Q. Can you tell me whether or not those are the chutes you testified about, or at least were in the compilations here as a cost item, of making those chutes?

A. I don't know that that's in the statement.

Mr. Olson: I object to cross-examination on that phase. It is not proper cross-examination in the rebuttal. There's no testimony that the cost of those chutes were included in the compilation in the first place.

Mr. Holman: Mr. Hendershott identified them.

Mr. Olson: No, he didn't.

The Court: I think it is proper to question him [2371] about the use of the chutes as it pertains to efficiency of the Mixomobile, but he didn't testify this time as to cost.

Mr. Holman: No, I didn't intend to go into cost.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, in 49-35 and 36, the fact is, is it not, that the Mixomobile instead of being right up at the form to pour is off at considerable distance, four or five feet?

A. It's more than that.

Q. And that is for the purpose of preventing the weight from caving down the excavation, is it not?

(Testimony of M. C. Schaefer.)

A. That isn't necessary; in other words, the use of the chute there, the length of the chute, would sort of determine the nearness or proximity of the mixer to the form.

Q. When you told counsel on direct that the Mix-mobile could be brought right up and poured directly into the chute——

A. ——Into the forms.

Q. ——you meant, did you not, that it could be poured into a chute at a sufficient distance to accommodate the weight of the Mixomobile?

A. I meant that there was no intervening method, as wheel-barrowing, or any other method, to take it from the mixer into the form.

Q. Then you were not talking about distance, you were talking [2372] about operation?

A. That's right.

Q. I see. Now, you, I believe, told counsel that a pre-mix truck, or a revolving transit mixer truck would have to remain until all of the concrete in the cylinder had been deposited in the form, correct?

A. Either into the form or into an intervening method of depositing it into the form.

Q. Don't you know as a fact, sir, from your general experience in construction, that the transit mixer is used for the purpose of dispensing anything from a bucket full to a wheelbarrow full to a cubic yard and go right on and deliver the rest to the next job?

A. Oh, most certainly, but the thing I meant was before it returned for another batch.

(Testimony of M. C. Schaefer.)

Q. Now then, Mr. Schaefer would it be possible for the transit mixer to place the concrete in one form and then place the remainder of the quantity in the next form?

A. That's correct. I've poured thousands of yards of concrete with pre-mix trucks.

Q. I just didn't want to mis-understand you on that, sir. Now, is it or is it not a fact that the mixer unit itself has a basic cost independently of the truck?

A. You can buy 'most any part of any piece of equipment.

Q. That's not what I asked. Has the mixer unit itself, [2373] independently of the truck, a basic cost?

A. Yes.

Q. And in answering counsel as to the cost of the Mixomobile, what type of truck did you figure?

A. Well, that's the price that I considered there was, what information I have as to the cost of ready-mix trucks, or pre-mix trucks.

Q. Well, what weight, what size, what make?

A. Two yards.

Q. Well, the trucks are not rated by yards, they're rated by tonnage, are they not?

A. No, they're rated by yards, two, three, five.

Q. Among standard makes, what would be the name of some of those trucks?

A. Some of them would be Ford, there's been Mack trucks used, Whites, a number of others.

Q. The heavier, the more durable and the more powerful the truck the higher the price, isn't that right?

A. That's right.

(Testimony of M. C. Schaefer.)

Q. And then by putting the mixer unit on top, the higher the over-all cost? A. That's right.

Q. So when you were answering counsel, what truck did you have in mind?

A. I didn't have any particular truck in mind.

Q. All right, sir. Now, you said, did you not, that you owned a Jaeger mixer at that time?

A. That's correct.

Q. And you had it available? A. I did.

Q. And did you have it available in April, 1944?

A. Yes.

Q. Did you have it available at the time you obtained 665 sacks of cement from the government?

A. Yes.

Q. Did you bring it here to use this 665 sacks of cement?

A. I did not bring that mixer up to this job.

Q. It is mobile, is it not, so it could be driven to this job? A. No, it is towed.

Q. Or is it towed?

A. It is towed by truck.

Q. You had trucks available so it could be towed to place concrete at that time, did you not?

A. That's right.

Q. And you did not use that 665 sacks of concrete at that time, did you, sir, in April.

A. In April? No.

Q. And you did not use it until July 31?

A. We didn't use this mixer on that job at all.

Q. I'm talking about that 665 sacks of cement.

A. No.

(Testimony of M. C. Schaefer.)

Q. How does that compare with a carload of cement, Mr. Schaefer?

Mr. Olson: Now, if the Court please, that's not proper cross-examination.

The Court: Sustain the objection.

Q. You spoke of dust accumulating on stock piles if they were placed out in the field. Did you contemplate complete stocking for the aggregates for the job at one spot? A. No.

Q. Or did you contemplate the aggregates for a reasonably accessible number of forms in which the concrete was to be placed?

A. The placing—in other words, I'd never given a thing like that any thought at all, only as to analysis here, or what somebody else has made his statement.

Q. That's right, I understand that you never did that. A. No, I didn't.

Q. So when you answered counsel about the dust, how large a stockpile were you contemplating?

A. Well, the stock pile necessary for each cluster of structures.

Q. And what would be the dimensions in a stock pile of that size? [2376]

A. The dimension of a stock pile like that would—

Q. Let's take the ordinary box structure.

A. Oh, say, you'd have material scattered there in a radius of 20 feet before you got through with it.

Q. How high?

A. I'm saying as to what it would be scattered to before you got your pour made.

(Testimony of M. C. Schaefer.)

Q. We're talking about a stock pile now. How large a stock pile would you have? Did you contemplate that up here when you were talking?

A. No, I didn't give that any thought.

Q. How large a stock pile would you have?

A. You'd have a pile there that would probably be four feet high.

Q. And what circumference, or diameter?

A. And it would be the pyramid type, and on a two-structure, you'd probably have about four, I'd say five yards, you'd probably have five yards of aggregate; there'd be somewhere you'd have a greater pile of that——

Q. Approximately what would the diameter be of that hill of aggregates?

A. Oh, a diameter of 10 feet.

Q. Now, tarpaulins are used, are they not, for covering in construction practice?

A. Do you mean you'd stick a tarpaulin over all those different [2377] piles of aggregate out there?

Q. You wouldn't do it?

A. I wouldn't even think about it.

Q. Now, you spoke of the dust. There was dust there, was there not?

A. There was.

Q. And that had a direct effect upon the operation of machinery, did it not?

A. Sure it did.

Q. The same dust?

A. Yes.

Q. And that's all machinery, whether it's yours or Macri's?

A. That's right.

Q. There was a direct dust application all the time?

(Testimony of M. C. Schaefer.)

Mr. Olson: That's not proper cross-examination.

The Court: Sustained. That's leading right out into the woods from something that was material.

Q. Now, your cost for excavating the entire of structures by hand is 31½ man hours per cubic yard of excavated quantities?

A. That's correct.

The Court: Well, we'll recess now for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.) [2378]

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Schaefer, I believe you told counsel that you had forms available if structures had been available on 1068, and you answered him you had the forms on job 1062. Had you made any purchase from Mr. Macri on those forms?

A. I did not.

Q. Is it not a fact that your sub-contract on 1062 provided as one of your duties that you would neatly pile the forms, and that the lumber was to become the property of Mr. Macri?

A. That's right, but I want to carry on from there a little bit, that isn't all.

The Court: Well, you've answered the question. Your counsel can qualify it.

(Testimony of M. C. Schaefer.)

Q. Now, do you have something else to say, sir?

A. On that?

Q. On that, yes. A. The——

Q. I say, do you have something else to say?

Did I cut your answer off, sir?

A. I was going to say that the forms——

Q. Pardon me; do you have something else to answer me on that question?

A. I was going to say that the forms were also going to be used down on 1068. [2379]

Q. Where is that provision in the sub-contract on 1068?

A. There is no such provision on that.

Q. Where is any writing that you have, giving you that right, sir?

A. That was verbal.

Q. Well, I'm talking about anything on the date of the sub-contract, sir?

A. There isn't anything in writing on that.

Q. Do you have anything else to say about that, Mr. Schaefer?

A. Well, it would just be unthinkable that Macri was going to pay for those forms on 1062, where we didn't have lumber on time, and so forth, and then provide altogether new lumber for the next job ahead, when he could move these here forms right down, and which they did do, they took these forms down to 1068.

Q. Don't you remember, sir, of my asking upon your examination in chief if you had complied with that provision of 1062, and your answer was that

(Testimony of M. C. Schaefer.)

Macri didn't give you time, that he took the stuff away? A. That's right.

Q. So your answer is it would be unthinkable that he wouldn't permit you to use them on 1068?

A. Well, that he wouldn't—yes, that's right.

Q. Now, is it or is it not a fact that you received two checks with vouchers attached? [2380]

A. I believe that's right.

Q. And do you have those vouchers, Mr. Schaefer?

Mr. Olson: Your Honor, that's not proper cross-examination. I've asked counsel to produce the checks themselves.

Mr. Holman: Well, I'll get them, your Honor, but I just am unable to get them; I was merely asking if you have those vouchers; if you have, I'd like you to produce them.

The Court: I'll overrule the objection.

Witness: I imagine counsel or Mr. Hendershott have them.

Q. Would you please step down and get them? We're talking about the same checks, Mr. Schaefer.

Mr. Holman: May I have these marked for identification, and your Honor, I request that the clerk make copies, and that the pencil memos on these be erased—I mean, not be erased, but be not shown on the copies, and then the originals returned to counsel it's from their file. I'd like to have them marked for identification.

(Whereupon, voucher received by Schaefer with check re estimate 11 was marked Defendant Macri's Exhibit No. 127 for identification.)

(Testimony of M. C. Schaefer.)

(Whereupon, voucher received by Schaefer with check re estimate 12 was marked Defendant Macri's [2381] Exhibit No. 128 for identification.)

Q. Handing you what has been marked Macri's identification 127, coming from your files, sir, and disregarding the pencil notations on there entirely, and Macri's identification 128, also from the same source, and calling your attention to the showing in Mr. Hendershott's compilation of receipt of \$2985.46, did you receive that check with that voucher? A. Yes.

Q. All right, sir; then calling your attention to April entry of \$7050.50, did you receive that with that voucher, sir? A. Yes.

Mr. Holman: I offer these in evidence, your Honor, and if counsel still desires the checks I'll be glad to look them up and bring them.

Mr. Olson: No objection.

The Court: Admitted.

Mr. Holman: Do you still want the checks?

Mr. Olson: I would like the checks.

Mr. Holman: I'll bring them.

(Whereupon, Defendant Macri's Exhibit No. 127 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 128 for identification was admitted in evidence.)

Mr. Holman: That's all my cross-examination.

(Testimony of M. C. Schaefer.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, I believe you testified yesterday that Mr. Staples told you that he could have gotten hold of Mr. Macri, but Macri had left instructions with him not to bother Macri unless there was something serious, is that right?

A. Not to get hold of him unless he had to.

Q. Unless he had to? A. That's right.

Q. And that conversation you had with Mr. Staples was on the 15th of June, was it not, sir?

A. That was on the 29th of April.

Q. Oh, that was on the 29th of April?

A. That's correct.

Q. Well, isn't it a fact that that conversation took place on June 15, Mr. Schaefer?

A. It did not.

Q. Isn't that the time that you told Mr. Staples that you would pull the men off the job?

A. No.

Q. You told Mr. Staples that you would pull the men off the job on June 15? A. On April 29.

Q. Now, you had no conversation with Mr. Staples on June 15? [2383] A. On June 15, no.

Q. I misunderstood your testimony yesterday. I understood that you testified that on June 15 Mr. Staples told you he could have gotten hold of Mr. Macri the day before, but Macri had told him not to bother him unless it was very important.

(Testimony of M. C. Schaefer.)

A. No, if I made that statement as on June 15 that's an error.

Q. That occurred on the 29th of April?

A. On the 29th of April.

Q. With reference to the transit mixer, Mr. Schaefer, your objection, as I understand it, to the use of the transit mixer on the job is that it will delay the pouring because you have to make trips back at the end of each pour.

A. It is not as economical, and——

Q. Well, now, by that you mean that it will cost more money? A. It will cost more money, yes.

Q. Now, why?

A. It's going to take at least one man more; you've got a bigger investment, and if we were to have a continuous pour as had been agreed, the one mixer and the dump trucks that we had, we own the dump trucks, and all we needed up there in addition to our then equipment was the mixer. We do not own any pre-mix trucks.

Q. Well, to get back to the question I asked you, Mr. Schaefer, you would save in that you would not have as [2384] many men on the job, and you would save in that you could get your work done faster, is that right? A. Yes.

Q. I see. Well, now, according to Mr. Bufton's testimony, the majority of these structures out there were structures that would require about $21\frac{1}{2}$ yards of concrete or cement, is that right?

A. Your structures run about 2 yards per structure, then they were in clusters, singles, doubles and triples.

(Testimony of M. C. Schaefer.)

Q. Now, how many yards of batching would your truck hold, about a yard and a tenth?

A. Our trucks hold three batches.

Q. That would be about $3\frac{1}{3}$ yards, is that right?

A. Of materials?

Q. Yes. A. Or concrete, we'll say.

Q. Well, let's say concrete.

A. The concrete batches were a little oversize; they were about one and a tenth.

Q. That's what I understood; therefore, if they held three batches, that would be about $3\frac{1}{3}$ yards, is that right?

A. Enough for $3\frac{1}{3}$ yards of concrete, yes.

Q. Then with one truck you didn't have to carry a full truck load to pour the average structure out there, did you? A. Now, wait a minute——

Q. Just a moment; answer my question. For the average structure you didn't have to carry a full load of aggregate?

A. Yes, you did, because the average structure was more than a single structure, that is, it was more than one structure per hole.

Q. Yes; in other words, there would be about six yards of concrete per hole?

A. That would be taking an average of two yards per structure, and if the average were two structures to the hole, you would have about four yards.

Q. About four yards? A. Yes.

Q. Then you'd get about $3\frac{1}{3}$ yards of material in your one truck, and then you'd send out another truck partly loaded, wouldn't you, for that cluster?

A. That's right.

(Testimony of M. C. Schaefer.)

Q. So that the second truck would be operating only half full, or thereabouts, would it not?

A. And then pull on to the next location.

Q. I beg your pardon?

A. I say, and then you'd move on to the next location.

Q. Well, yes, you'd move the Mixomobile on to the next location.

A. Yes. [2386]

Q. And you couldn't use the balance of the material in that truck until the mixer was moved?

A. That's probably correct.

Q. So you would have the truck tied up during the balance of that time?

A. That's right.

Q. Well, wouldn't that offset the time that with a transit mixer you could go right ahead and pour?

A. No, you'd move this here equipment that we had on that job just about as fast as you're going to move a transit mixer on that job.

Q. Well, I'm speaking of a transit mixer on a truck; not one you're going to pull.

A. Our mixer is also on a truck.

Q. I appreciate that, but you also had a truck tied up while you moved that mixer. If you had a transit mixer you could move right on to the next structure.

A. Yes, sure you could.

Q. And you wouldn't have your trucks tied up.

A. You wouldn't? What would you have your pouring equipment on?

Q. I beg your pardon?

A. I say, you still had some truck to move your pouring equipment.

(Testimony of M. C. Schaefer.)

The Court: It isn't proper for the witness to [2387] ask questions. You try to answer him. Go ahead.

Q. Mr. Schaefer, when you estimated it would take $3\frac{1}{2}$ man hours per cubic yard to excavate ground by hand, did you have in mind using a pick? A. Using a pick?

Q. Yes.

A. There was a little pick work there, yes.

Q. But not much? A. No.

Q. In other words, you had in mind just plain shoveling for the most part? A. That's right.

Mr. Hawkins: I think that's all.

Cross-Examination

By Mr. Ivy:

Q. Mr. Schaefer, you made response to counsel that you couldn't submit a bill until the job was finished, for the additional cost. Will you please explain that?

A. How could I determine what my bill was to be until I was through with the job?

The Court: Well, answer the questions.

Mr. Olson: Mr. Schaefer, just answer the questions.

A. Well, I couldn't determine what my cost was until I was through with the job.

Q. Then no detail at all was kept of any additional costs, is that correct? [2388]

A. No, we didn't keep the cost in that manner, no.

(Testimony of M. C. Schaefer.)

Q. You have no record, then, of any of the additional costs which you are stating that Mr. Macri caused you over and above your contract?

A. We had a certain amount of segregation in our daily reports, but there is so much of the work that you just couldn't segregate.

Q. Was it a part of your agreement with Mr. Macri on April 29, and again spoken of on June 15, that no detail of additional cost would be submitted until the end of the job?

Mr. Olson: That's not proper cross-examination, your Honor.

The Court: Overruled.

A. No, there was no such conversation, that is, there was no conversation on that point.

Q. There was no agreement on that point?

A. There was agreement that he was going to pay for all our additional cost and expense. He was going to pay for all our costs.

Q. But you kept no record of the additional cost, is that correct?

A. Not as such, no. They weren't segregatable. You couldn't segregate them. He was going to pay for all our costs.

The Court: Well, that last is not responsive, and [2389] will be stricken. I thought there was no question here at this stage of the trial that there has been no effort to segregate the costs. You make no claim of that, do you, Mr. Olson? I think your contention is that the oral contract entirely superseded the written contract, and that there was no

(Testimony of M. C. Schaefer.)

occasion for a statement being made or rendered as to additional cost. Is that your position?

Mr. Olson: That is our position with reference to the oral agreement, your Honor.

Mr. Holman: I was trying to get in an objection and move to strike to Mr. Ivy's interrogation on the last three questions, on the ground it was their case in chief, and it was not proper rebuttal, but I guess I arrived too late. I'm sorry. The point I'm making, as far as Macri is concerned I don't want to be called upon to again refute the statements on Mr. Ivy's cross-examination.

The Court: I think that's correct. It won't be regarded as evidence against Macri.

Redirect Examination

By Mr. Olson:

Q. Mr. Schaefer, did you have any discussion with Mr. Macri relative to the use of forms that were used on 1062, on 1068? A. Yes.

Q. Would you state when that conversation took place?

A. Well, that conversation took place at the time that we [2390] signed the second contract, and at the time, or at a meeting previous to the time of signing the contract, the time I quoted him the price on the job.

Q. And what was said about it, Mr. Schaefer?

A. Well, he said "It isn't going to cost you as much on this job, because you can take the forms on from the first job right on to the second job and use them."

Mr. Olson: That's all.

(Testimony of M. C. Schaefer.)

Recross-Examination

By Mr. Holman:

Q. Where was the other conversation, you said at the time of signing the second contract, where was that? A. Signing the contract?

Q. Yes, where was that?

A. That was in the Stadium Homes job office.

Q. And where was the conversation that you said preceded that?

A. We were out on the field, and went over the job on 1068.

Q. When?

A. I couldn't give you the exact date on that. It was previous to the signing of the contract on 1068.

Q. Yes, sir, but when?

Mr. Olson: He says he can't say.

Q. Well, let's approximate it. What's the date of your second contract, the sub-contract, you term that, do you not? We don't need to test memory; it's dated, is it not, [2391] April 21?

A. April 21.

Q. Yes. Now, how long before that?

A. Oh, it may have been a couple of weeks.

Q. And you gave Mr. Macri those figures out in the field at that time, did you not, your figures?

A. I believe I gave those figures to him.

Q. Those are the ones you identified here the other day?

(Testimony of M. C. Schaefer.)

A. I believe that's where I gave him those figures.

Q. I can't recall the exhibit, I don't remember the number; the one I showed you the other day?

A. Yes.

Q. 78; and who was present at that time?

A. At the time when we had that conversation?

Q. In the field, yes, sir.

A. Well, that conversation I believe took place in the job office on 1062.

Q. Yes, but tell me who was present? Now you take it out of the field and put it in the job office, is that correct?

A. Well, that is, we went over the field that day, over 1068, and returned to the job office on 1062.

Q. You went over the field on 1068 and came to the job office on 1062?

A. That's right.

Q. All right; now, who was present? Was Mr. Hendershott [2392] present?

A. No.

Q. Mr. Darcy?

A. Brother Bill. I wouldn't say that brother Bill was right there at that time that we had this part of the conversation. It was on that day brother Bill, Mr. Macri, Mr. Nelson and I drove over the job site on 1068.

Mr. Holman: I move that be stricken, your Honor. I asked who was present at that time.

The Court: I think what counsel wants to know is this conversation that you've related, was that in anybody else's presence so far as you remember, and if so, whose presence. Is that what you want to know?

(Testimony of M. C. Schaefer.)

Mr. Holman: That's right.

A. I wouldn't be able to say whether Mr. Macri and I were alone or whether brother Bill happened to be there; I couldn't say.

Q. Then at the time of signing the contract, who was present at that conversation?

A. There was Mr. Macri and myself; there wasn't anyone else right there.

Q. Brother Bill?

A. No, brother Bill wasn't there. There were other office help there, but they weren't paying attention to our conversation, I'm sure. [2393]

Q. They weren't interested in the conversation?

A. They didn't have any interest in the conversation.

Q. And you would fix the prior meeting out in the field where you have detailed this conversation as in April, and shortly preceding the signing of the sub-contract, Exhibit 6, would you not?

A. I wouldn't be able to state now whether it was two weeks or more; I'd say in the neighborhood of two weeks previous to signing.

Q. Mr. Schaefer, when you testified in chief you had a memo of each time you were on this job, and read it, did you not?

Mr. Olson: That's not proper cross-examination.

A. I don't remember that.

Q. Sir? A. I don't remember that.

Q. And by reference to your memo you can't give me the date, huh?

A. I can give you lots of dates of the times when I was out on the job.

(Testimony of M. C. Schaefer.)

Q. No, I'm talking about this same conversation; nothing else in the world.

A. But I couldn't offhand give the date of the conversation.

The Court: The question is, can the witness give or can he not give the exact date of the conversation? [2394]

Mr. Holman: That's correct.

The Court: Can you answer that, Mr. Schaefer?

A. I cannot.

The Court: All right, proceed with the examination.

Q. Was it in the month of April?

A. I believe so.

Mr. Holman: That's all, your Honor.

The Court: Any further questions?

Mr. Olson: No, your Honor.

The Court: Mr. Hawkins?

Recross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, perhaps I was laboring under a misapprehension. You did take your men off the job in June, 1944?

A. We did take the men off the job, yes.

Q. That's evidently what I was thinking of, and as I understand it, you did that because Macri was not excavating according to your requirements?

(Testimony of M. C. Schaefer.)

A. At the time that there were no men on the job there was no excavating, no fine grading ahead of us, that is, no fine grading ahead of us, and there was no lumber or material in the yard for the men to work on. We did have two men at the time, that I pulled off the main crew, we did have two men, I believe it was Klug and Monrad, working in the field, and when they wound up with the form [2395] lumber that was then in the field, and tied a certain amount of steel, there was a period of ten days that they pulled off the job. There just wasn't anything for them to do.

Q. Well, the reason you moved off the job was because you couldn't make any money on the job under those conditions?

A. It was because we didn't have any material.

Q. And it was because you couldn't make any money; you would operate at a loss under those conditions?

A. No, that wasn't it. My bond kept me tied to that job.

The Court: Any further questions?

Mr. Holman: Your Honor, I would like to ask this witness one further question.

The Court: We'll have to conclude with this witness some time. I don't know how many cross-examinations there have been, but it is at least six; now ask your question, Mr. Holman.

(Testimony of M. C. Schaefer.)

Recross-Examination

By Mr. Holman:

Q. I'm calling your attention to the detail of the times you were on the job in the month of April, 1944, namely April 12, 27, 28 and 29. Now, can you tell me whether or not it was April 12 you talked to Mr. Macri, or some other day?

Mr. Olson: The witness has already said about four times it was about two weeks before the contract was [2396] signed.

The Court: I'll overrule the objection. He may answer if he can.

A. I couldn't specify the date on that right now. No, I can't.

Mr. Holman: That's all.

The Court: Any other questions?

Mr. Olson: No.

(Whereupon, there being no further questions, the witness was excused.) [2397]

PATRICK L. DARCY

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Darcy, it was testified here that Mr. Curtis Sheffield was an employee of Mr. Macri and was in charge of fine grading. Do you remember Mr. Curtis Sheffield?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. And would you state what he did on 1062, as Macri's employee?

A. Well, I've seen him do just about everything there was to do there, except for supervision, except fine grading.

Q. Well, what was his chief occupation with reference to [2398] what he did?

A. Well, he drove the truck and supplied various crews, hauled men back and forth from one operation to another, took fuel and equipment, stuff to the shovel, and he helped lay out for the shovel, especially on pipe line trench, and he hauled materials.

Q. Did he do some fine grading?

A. He never did any fine grading on that job from the time I went on there until he left the project.

Q. Did he supervise any of it?

A. No, he didn't supervise any of it.

Q. Now, you were here when Mr. Arthur Anderson testified? A. Yes.

Q. He testified at one time that he talked with you on the job nearly every day. Is that true?

A. That's not true.

Mr. Holman: I challenge that statement, your Honor. It was nearly every day that he was there. Your Honor will recall that I cross-examined Mr. Anderson and asked him what he meant by "was there."

The Court: He said he went over the job nearly every day. I think it would be proper to ask Mr. Darcy how often he did talk with Mr. Anderson.

(Testimony of Patrick L. Darcy.)

Q. (By Mr. Olson): Mr. Anderson's testimony was quite inconsistent in places, but I did have that note. How [2399] often did you talk with Mr. Anderson, and under what circumstances?

A. Well, the first three months that I was up there it was very rarely, possibly once a week, that I saw him, until Murphy-Campbell turned over their work, the bonding company assigned it to somebody else, and he went with it, and he moved into Collucio's camp, right across the road from our camp.

Mr. Holman: Your Honor, I move that portion of the witness's statement with respect to Murphy-Campbell transactions with the bonding company be stricken.

The Court: It will be stricken.

A. From the time he moved over to Collucio's camp, then, I saw him two or three times a week, from two seconds to a minute or so, mostly when we'd pass on the road and stop and talk a minute and go on.

Q. Did you see Mr. Anderson out of his car and out on the project 1062, inspecting the structure excavations? A. No, I never did.

Q. And were you around these excavations that you were working on, yourself, while you were there?

A. Yes, back and forth, on them four or five times for every one that was set.

Q. Now, there's been considerable testimony here about the operations of this shovel or hoe. Did you see that hoe [2400] in operation?

(Testimony of Patrick L. Darcy.)

A. I quite often stopped and watched the shovel operating, digging the structure excavations.

Q. And would you explain the operation of that shovel with reference to whether or not it could and did leave vertical banks after it completed its rough excavation?

A. Well, on a rough excavation it usually left an almost vertical bank on one side.

Q. Which side?

A. The side next to the machine. The natural action of the dipper on the dipper stick is an arc down to a position approximately a track width below the track level. From there it can operate on a plane to itself, and then it can be raised absolutely vertically; as it comes down and digs across the bottom of an excavation then it can be lifted straight up and dumped.

Q. And the side where it could be lifted vertical would be what side or end with reference to the machine?

A. The nearest to the machine.

Q. Now, then, what slope, if any, was left by the hoe operation? Where would that be with reference to the portion of the excavation which was to be occupied by the structure?

A. Well, the teeth of the dipper would start in at a lateral clearance about a foot outside of where the structure [2401] would be, then it would cut down and leave a corner, and that bank would have to be plumbed up by hand.

Q. And that corner that would be left, where would that be with reference to that part of the excavation where the structure was to be placed?

(Testimony of Patrick L. Darcy.)

A. Well, it would run from what should have been the clearance outside the structure to under where the structure would sit.

Q. Did you, Mr. Darcy, make a little diagram illustrating the testimony you've just given?

A. Yes.

(Whereupon, Diagram of excavation, by Darcy, was marked plaintiff's Exhibit No. 129 for identification.)

Q. Mr. Darcy, showing you plaintiff's identification 129, I'll ask you what that is?

A. That's a diagram showing an excavation as roughed out by the hoe in a solid pencil line, and in dotted pencil line the fine grading that would be necessary in that hole as the holes were that we worked in, and the red lines showing in solid red line, an outline of the head wall of the structure with the inlet made, and the dotted red lines through that head wall shows where a cross cut section of the box would be, and the floor of it, and on the bottom of the diagram, in a dotted line, shows how the sub-wall would extend down into the undisturbed dirt.

Q. Do you show on that diagram a typical bank left by the hoe after completion of its part of the excavation operations?

A. Yes, that's indicated in the solid pencil line.

Q. By the solid pencil line? A. Yes.

Q. Which portion or which part of that diagram would the hoe be placed in making that excavation, or do you show that on there?

(Testimony of Patrick L. Darcy.)

A. The hoe would be operating from the right side of the hole as it shows on the diagram, digging from the left side to the right.

Mr. Olson: We offer plaintiff's identification 129.

Mr. Holman: Let's see it. May I ask a question of the witness?

The Court: Yes, on the admissibility.

Q. (By Mr. Holman): Mr. Darcy, was this made up from any particular structure that you can designate as to number? A. No, it is not.

Q. All right, sir; then all dimensions on this are of your own devising, to indicate the operation?

A. No, they're an average of six structures.

Q. What six?

A. Just going from the front of the book through, taking that type structure as I went.

Q. May I understand, you went through, you say the front of the book, you mean Exhibit 3, the contract, typical forms, or the lay-out?

A. The structure lay-out plan.

Q. Did you make any note of the structures you used?

A. No, I just marked down the depths and averaged them up. The head walls ran from eight feet to eleven feet wide.

Q. And you took both the shallow and the deep structures, and got an average from that?

(Testimony of Patrick L. Darcy.)

A. I took the depth of each one of those structures and averaged them up.

Q. Well, did you look for deep structures?

A. No, just as they came.

Q. Did you take any of the shallow structures?

A. Yes.

Q. How shallow?

A. The shallowest one was three and a half feet deep.

Q. And did you take any of the deepest?

A. There was one that was a little over five feet.

Q. Is that the deepest?

A. That's the deepest I checked.

Q. Is that one on which you made model 25, as a replica? [2404]

A. No, that's an entirely different type structure. These are all boxes, with a head wall. That's either an inlet or outlet of a pipe line.

Mr. Holman: Well, subject to not being bound by the witness's average of structures, I see there is no objection to this being admitted, illustrative of his testimony.

The Court: Any other objection?

Mr. Hawkins: No, your Honor.

The Court: It will be admitted for the purpose of illustrating the testimony of the witness.

(Whereupon, plaintiff's Exhibit No. 129 for identification was admitted in evidence.)

(Testimony of Patrick L. Darcy.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, showing you plaintiff's Exhibit 49, and directing your attention to picture number 81, I'll ask you if you can recognize that picture as being an excavation made by hoe operation?

A. Yes, that's the excavation for structure number 12 on 1068, where the first lateral on that project crosses the county line road.

Mr. Holman: Your Honor, I submit this is not proper rebuttal.

The Court: It pertains to the manner of operation of the hoe, doesn't it? [2405]

Mr. Holman: Yes, but they put these pictures in and testified about them on the case in chief.

The Court: Well, he can call attention to any that illustrates his testimony as to whether the hoe cut a vertical bank or not. Go ahead.

Q. (By Mr. Olson): Can you tell, Mr. Darcy, from your recollection, where the hoe was with reference to that picture?

A. You mean when it dug the hole?

Q. When it dug the hole, yes.

A. It dug from the far end of that hole.

Q. And from the far end, that would be the end shown nearest the top of the picture?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. So that that portion of the hole would be nearest to the machine? A. Yes.

Q. I call your Honor's attention to the picture. Now, Mr. Anderson also testified, I believe, Mr. Darcy, that one man should hand excavate, or rather, fine grade, five structures per day as the holes were left by the hoe. Now, state whether or not that was possible, for one man to excavate an average of five structures in the manner in which the hoe excavation was left?

A. That's absolutely impossible.

The Court: Wait—did you have an objection?

Mr. Holman: I object to counsel's question when he says "excavate." The testimony was fine grading.

Mr. Olson: Well, I'm referring to fine grading.

The Court: Whose testimony are you referring to?

Mr. Olson: Mr. Anderson. Counsel objected to the form of my question. If I asked it the way counsel says I did, I certainly didn't mean to.

The Court: Well, as I understood Mr. Anderson's testimony, he made an estimate of what it would cost to excavate these structures entirely by hand.

Mr. Holman: That's Mr. Hance.

The Court: All right. Reframe your question.

Q. (By Mr. Olson): Mr. Darcy, Mr. Anderson testified that one man could fine grade by hand approximately five structures per day, taking a hole left the way they were left by the hoe excavation.

(Testimony of Patrick L. Darcy.)

Now, I'll ask you whether or not one man could excavate, hand excavate, that portion of the fine grading per day, or average that, on the type of structures on this job, from the condition in which the holes were left by the hoe?

A. No, it is absolutely impossible.

Q. Now, Mr. Ashley testified, I believe, Mr. Darcy, that he requested from you a list of the entire amount of lumber needed for the completion of the 1062 project. Did he do that? [2407]

A. He did that soon after I went on the job up there, but I told him I hadn't had time to check up and see what forms we had on hand and how much material would be needed; that I'd give it to him as soon as I could get that checked up and figured out.

Q. Now, were you present with Mr. Schaefer at the time he testified to having a conversation with Mr. Ashley in Coeur d'Alene, Idaho? A. Yes.

Q. And did you participate in that conversation with Mr. Ashley on October 26, 1946?

A. Yes, I did.

Q. Now, did Mr. Ashley at that time state in substance or effect that the running of Mr. Macri's job was in fact a two-man job, but that Mr. Macri—and for that reason he requested that Mr. Staples stay on the job, but that Mr. Macri would not permit it? A. Yes, that's what he said.

Q. Did Mr. Ashley further state at that time that Mr. Macri called him and asked why Mr. Staples was still on the job, and that Mr. Ashley

(Testimony of Patrick L. Darcy.)

replied that he was still learning the job, and that Mr. Macri then replied to Mr. Ashley in substance that "You had better learn quick, because Mr. Staples has to get off the job"; did Mr. Ashley make those statements to you, in substance or [2408] effect, at that time?

A. Yes, that's what he told us.

Q. Now, at the same time and place, Mr. Darcy, did you have a conversation with Mr. Ashley as to what had caused his blow-up with Mr. Macri?

A. Yes, I did.

Q. Would you state what was said?

A. Well, I asked him myself, I said "Verne, I'd like to have you tell me just one thing, the straight of it; I'd like to know what caused your blow-up with Macri, and why you left the job."

Q. What did he say?

A. Well, he enumerated several things, including a lack of machinery.

Mr. Holman: Just a minute; counsel asked him what he said.

A. Well, he said because he didn't get the machinery he needed when he asked for it, because he couldn't get lumber when it was needed and asked for, he said he had negotiated with two different engineers to take over the grading, engineering, on that work, but when he had consulted with Mr. Macri he refused to pay the required wage scale for that kind of labor, and he couldn't put them on, because they wouldn't work for any less, and he didn't have equipment to handle fine grading crews [2409] or get them around on the job.

(Testimony of Patrick L. Darcy.)

Q. Now, Mr. Darcy, Mr. Ashley further testified in substance that he had sent you some fine graders to fix up the holes, along with your workmen, and that after a few days you told him they didn't want the fine graders any more, and for him to get them out of your way. Did you state in substance such a state of facts to Mr. Ashley?

A. No, I never did. We never had any fine graders sent to us for that job.

Q. What was the situation with reference to fine graders sent back when you requested them from Mr. Ashley?

A. Well, as I said, from the time I first got there until Ashley left the job the only time we ever had a fine grader up there to do work was Ashley himself, or a Mexican lad, I think his name was Hernandez, and when that laborer came up to grade excavations we reported to Ashley how long he'd have to sit there, two or three hours, waiting for Ashley to tell him what was wrong and how to do it, and usually Verne would get him started and leave him, and he'd only tell him on one or two, and then he'd possibly spend the rest of the day sitting out there waiting.

Q. Now, did you tell Mr. Macri at any time you did not need the chute lumber until the end of the job?

A. No, I did not. [2410]

Q. Did you ever give Mr. Macri direct a list of lumber needed for the chute?

A. Yes, the third time that was ordered.

Mr. Holman: I move that last be stricken.

(Testimony of Patrick L. Darcy.)

The Court: It may be stricken.

Q. About when did you give Mr. Macri the order for the chute lumber?

A. Along the early part of October; I don't remember exactly the date.

Q. How many times did you order the chute lumber? A. Four times.

Q. Do you have the dates that you ordered it?

A. The 16th of October, the third time it was ordered.

Q. Do you have the dates that you ordered it all four times? A. Yes.

Q. Would you state when you ordered it, and to whom you gave the order?

A. Well, I personally delivered the order on July 22, although I didn't make that order up, I just delivered it as it had been figured up. It was delivered June 21, July 22, October 16, and the Saturday before Christmas, 1944.

Q. You went too fast for me; June 21; July 22;—

A. October 16, and the Saturday before Christmas; I think that was the 21st of December, 1944.

Q. Now, were any of those orders given to Mr. Macri personally?

A. Yes, on the 16th of October.

Q. And on the order given June 21, did you give that order?

A. That was given by John Klugg.

Q. The September 22, who was that order given to—I mean July 22.

(Testimony of Patrick L. Darcy.)

Mr. Holman: Pardon me; did you say the last was given by John Klugg or to John Klugg?

A. The order was given by John Klugg.

Q. Now, your July 22 order was given to whom?

A. I gave the copy of that to Ashley.

Q. And your October 16 order was given to whom? A. To Mr. Macri himself.

Q. And your December 24, or 21, the Saturday before Christmas, who was that to?

A. That was given to Sam Burnsted to take into the Seattle office when he was going in for Christmas.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Thursday, *October 20, 1947*
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may the record show that [2412] I am handing to counsel, as I have already handed him before the Court re-convened, Macri check 1022, March 9, 1945, for \$2,985.46, and perforated as paid, and check number 1185 for April 28, 1945, for \$7,050.50, perforated as paid, and bearing the endorsement on the side; "payment of sub-contract, specification 1062, estimate number 12, March."

(Testimony of Patrick L. Darcy.)

Mr. Olson: I would like the record to show also, your Honor, that the two checks were given to me on the condition that I make photostatic copies of them, and because of the conditions under which they were handed to me, I now return them.

Mr. Holman: I will assume the photostatic copies your Honor, if he wants to offer them.

Mr. Olson: Your Honor, we offer into evidence at this time our identification 32, that being the copy of the letter addressed to Macri and Company under date of February 13, 1945, purporting to have enclosed the monthly statements which are identification 119.

Mr. Holman: Well, your Honor, we're in the same position on this we were before. Your Honor will recall this came up early; it doesn't show who wrote the letter, we have never received it, and it is a carbon copy, and counsel on his previous offer of it, as I recall, said he thought it came from Mr. McKelvey's office, and I [2413] questioned that very much, because it didn't contain the usual indication of McKelvey's initials and some stenographer typing it, nor does it bear Mr. McKelvey's name. It is absolutely strange to us.

The Court: It is a copy ostensibly directed to Mr. Macri, and there's been no evidence of it having been mailed?

Mr. Olson: That's true, your Honor.

The Court: The objection will be sustained.

(Testimony of Patrick L. Darcy.)

Direct Examination
(Continued)

By Mr. Olson:

(Whereupon, the reporter read the last previous answer.)

Q. Now, after that, Mr. Darcy, did you have a conversation with Mr. Macri relative to the chute lumber? A. Yes, about the——

Q. When?

A. Oh, the 5th, I think it was, of January.

Q. Where?

A. On the job; the 5th or the 6th; it was a Friday of that week.

Q. And what did Mr. Macri say?

A. Well, he wanted to know what that much lumber was wanted for, so I explained to him that due to not having had delivery on it before, to carry the operations on the chute work along with the other work, that we would have [2414] to do it all at once, and it would take a good deal more lumber than we had previously ordered for that, and we had to have that much lumber to do that work then, that late in the job.

Q. Did he say whether or not that lumber had as yet, that late, been ordered?

A. He said it hadn't been ordered, but that he understood what it was for; he'd get it over there as soon as he could.

(Testimony of Patrick L. Darcy.)

Q. Now, do you recall on or about the 9th day of September, 1944, a representative of a lumber company from Klickitat being on the job?

A. Yes.

Q. And were you present when the representative talked to Mr. Mose Stickney——

A. I took him——

Q. ——foreman of Mr. Macri's job; were you present?

A. I took him to Mr. Stickney.

Mr. Holman: I wish to object to this inquiry as having been covered on direct examination by their own witness, Stickney.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I don't recall having asked Mr. Stickney about this representative from Klickitat Lumber Company. I asked Mr. Macri about it, and Mr. Macri denied it, but I don't believe I asked Mr. Stickney a thing about it.

The Court: Overrule the objection.

A. Yes, I was there. I took him in to meet Mr. Stickney.

Q. And would you state what this salesman from the lumber company said, if anything, in your presence?

Mr. Holman: That I object to as hearsay.

The Court: Well, it would be, unless it is impeachment of Mr. Stickney. Was it?

(Testimony of Patrick L. Darcy.)

Mr. Olson: No, I'm speaking of Mr. Macri. I think counsel's point is well taken on that.

Q. (By Mr. Olson): Did you hear a 'phone conversation at that time, Mr. Stickney's end of it, with Mr. Macri? Were you there when he called Macri? A. Yes.

Q. Now, would you state what you heard Stickney say afterwards with reference to what Mr. Macri had said?

Mr. Holman: I object to that. They had the witness Stickney on the stand, the one who was actually telephoning, if he did telephone, and they either asked him about it or they didn't, in their case in chief, and certainly this is not proper rebuttal.

The Court: It seems to me it would be hearsay, if you're asking for what Mr. Stickney, after he turned away from the 'phone, said Mr. Macri had said on the 'phone. It wouldn't be a conversation in Mr. Macri's presence.

Mr. Holman: He's asking him to say what Stickney said in that 'phone call to Mr. Macri, and certainly that would be hearsay, at least until it was established there was a 'phone call between Stickney and Macri, and if there was, your Honor, Mr. Stickney was here on the stand, and this is certainly not proper rebuttal.

Mr. Olson: I don't understand. I could ask Mr. Stickney on the stand as to what Mr. Macri had said to him in that conversation, but the purpose of asking this is that Mr. Macri denied this con-

(Testimony of Patrick L. Darcy.)

versation. Now, I'm offering to show that Mr. Macri's foreman after completing a 'phone call in Mr. Darcy's presence, said what Mr. Macri had said.

Mr. Holman: My position still is that it is part of their case in chief, and they had the very witness they claim was participating, and they either asked him about it or they didn't, therefore it is not proper rebuttal.

The Court: It wouldn't be part of their case in chief, if Mr. Macri had admitted having such a conversation, but I think if Mr. Macri denied he had a conversation, [2417] you would have to prove it by the witness Stickney, otherwise it will be what Stickney told this witness Macri had said. The objection will be sustained.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, between the dates of November 30, 1944, and January 3, 1945, will you state whether or not you had form panels adaptable to use on job 1068, which were then ready and available for use on 1068, had excavations on 1068 been ready for their use? A. Yes, we did have.

Q. And those forms were from what source?

A. They were forms that would no longer be needed in the structures, that remained to be poured on 1062; had been cleaned and piled, ready to go

(Testimony of Patrick L. Darcy.)

to 1068, if and when we started any operation there, or to be turned over to Macri if we didn't.

Q. Now, with reference to the chute on the Mixomobile, Mr. Darcy, what was the use and purpose of that chute? A. Well——

Mr. Holman: Again I submit that is not proper rebuttal. Their entire equipment was fully explained on their case in chief, including the matter of these chutes, both before and after the elevator was removed.

The Court: I assume the purpose is bearing upon the relative efficiency of the Mixomobile and other types [2418] of equipment.

Mr. Olson: Yes, your Honor. Counsel interrogated at some length on the use of the chute, and indicating it is not proper.

The Court: Overrule the objection.

A. The use of that chute, and the main plan in having it made in sections, so we could take off or add sections, is so that we'd only have to make one set-up of the mixer at the structure. Some of those would be 22 feet wide, and quite a distance, so we would use the chute, all the sections, to pour on the far side of the structure, and as the pour came nearer, reduce the length by taking off sections, and then when you get next to the structure, possibly have to pull the mixer up a few feet for the last piece of chute to be able to reach the nearest walls. That eliminated the use of staging and wheelbarrows, extra stuff that would be necessary in handling and making the pour.

(Testimony of Patrick L. Darcy.)

Q. Mr. Darcy, did you require or was there used in your performance of 1062 any four by eights? A. What was that?

Q. I say, was there required or did you use in your performance of 1062 any pieces of lumber that were four by eights?

A. No, nothing that size.

Q. Do you recall what a four by eight was used for, and by [2419] whom it was used?

A. Macri's crew used four by eights for runners on a sled that they built to haul equipment around for the pipe line crew.

Q. How about three by tens? Did you use any three by tens on this job 1062?

A. Only those that we cut up for blocks to block up the mixer, and then ripped into two by threes for structure forms, studs on the outside panels of the chute forms.

Q. Well, did Mr. Macri use any lumber on this job in connection with his operations?

A. Yes, they used quite a bit of heavy stuff.

Q. What did they use them for?

A. Temporary bridges over open ditches on road crossings, and, well, two or three places where they had to cross the open ditches, that couldn't be filled when they had to be crossed, out in open fields, and there was a truck bed built, and then there was a frame work built up there in the yard to hoist engines out of trucks that were being repaired.

Q. Do you remember what type of lumber was used for that hoisting those motors out of the trucks?

(Testimony of Patrick L. Darcy.)

A. Well, the main beam must have been around a four by eight, or heavier, and then there was some heavier pieces for legs under it, and some heavy bracing, I think about [2420] four by four bracing on it.

Q. Showing you Macri's Exhibit 104-32, I'll ask you if you recognize the lumber shown on that invoice as being any lumber which you used or the Concrete Construction Company in connection with 1062; or can you say what it was used for?

A. Not that amount from that source. We used some of that dimension on the chute, but it came from Seattle on a big load.

Q. Did Mr. Macri use any lumber of that type?

A. There was that size of lumber went into that truck bed, two by ten.

Q. Was there any lumber used in connection with the pipe laying operations?

A. Yes, they used some heavy planks, two inch stuff, and then the stuff that went into that sled that they hauled their equipment on; two sleds built, because one of them wore out.

Mr. Olson: That's all; you may examine.

Cross-Examination

By Mr. Holman:

Q. With reference to 104-32, do you know whether or not Mr. Macri got the heavy timbers you spoke of from the Bureau of Reclamation itself?

A. No, I wouldn't know where they got them.

(Testimony of Patrick L. Darcy.)

Q. You don't know, do you, sir? [2421]

A. I don't know where that stuff came from.

Q. Now, you don't claim, do you, Mr. Darcy, that with respect to 104-32, which is dated November 27, 1944, you have a specific memory as to these particular items that are listed here, do you?

A. I know at the time that we didn't receive any of that dimension of lumber.

Q. Well, when you say we didn't receive——

A. Concrete Construction Company.

Q. Is it or is it not a fact that the lumber was received by John Klugg? A. Very seldom.

Q. And is it or is it not a fact that John Klugg was the man who fashioned the lumber?

A. Did what?

Q. Fashioned, shaped it?

A. To a great extent, yes.

Q. Absolutely, was it not?

A. It was not absolutely.

Q. Do you say that John Klugg did not attend to your job yard work from beginning to end?

A. He did, but a good deal of it under my supervision or instruction.

Q. Never mind that; he did, didn't he?

A. He did the work, yes. [2422]

Q. And John Klugg was in a position to know all the lumber that came into the yard?

A. I wouldn't say that he was.

Q. Well, would you say that he was not?

A. Some of the time he wouldn't be there to know about it.

(Testimony of Patrick L. Darcy.)

Q. And he stayed away, to never know anything about it?

A. I didn't say that he'd never know about it. There were times when he was off the job when lumber was received there. There were times when he was off sick, or on his own business.

Q. What time?

A. The manifests of the daily report will tell that.

Q. Can you tell me, please, sir?

A. Only by the manifests on the daily reports.

Q. You have no recollection of that, sir?

A. No, not as to dates.

Q. How much time was John Klugg off the job, as a total?

A. Well, I wouldn't say without checking it.

Q. Wasn't it a fact, Mr. Darcy, that John Klugg was on the job before you got there, stayed on the job while you were away from it, and was on the job at the end of it?

A. No, I let him go a couple of weeks before the job was completed. We had other work he wanted to get to. He was there when I got there, yes.

Q. You claim this was within one or two weeks of the end of [2423] the job, this 104-32?

A. Oh, no, I didn't.

Q. Did you make any notes of your conversation with Mr. Ashley?

A. Only as noted on the back of the daily reports.

(Testimony of Patrick L. Darcy.)

Q. I'm talking about up at his house—you wouldn't make that note on the back of the daily report—at his office in Coeur d'Alene.

A. Oh, yes, I made notes there.

Q. Where is your notes?

A. I have them in my pocket.

Q. And you could testify without refreshing your memory? A. Yes.

Q. Where did you make your notes?

A. Mostly while I was sitting there talking to Mr. Ashley.

Q. Did you show them to Mr. Ashley?

A. I didn't show them to him. He knew I was writing.

Q. I'll ask you if it is not a fact that Mr. Ashley stated he would not give you a statement?

A. No, he didn't; he——

Q. Did you get a statement from Mr. Ashley?

A. No, we didn't get a statement from him.

Q. Now, the panels that you were talking to counsel about, being on 1062 and to be used on 1068, are the same panels Mr. Schaefer talked about this morning in testifying? [2424]

A. I presume so.

Q. Well, you know so, don't you, sir? You know that's a fact, isn't it?

A. Yes, I'd say I know it must be the same ones; it's the only ones we had.

Q. And is it or is it not a fact that there were two metal chutes made for this Mixomobile, and that the total length of the two of them was thirty feet? A. It was not.

(Testimony of Patrick L. Darcy.)

Q. What is the fact, sir?

A. I wouldn't exactly say the length of one piece. We had one piece that was 12 feet long, with three 3-foot additions, and another piece that was loose, to be added if needed.

Q. Twelve feet, plus three of three feet each?

A. Yes.

Q. And then what else?

A. Then there was another piece about ten or twelve feet long.

Mr. Holman: That's all.

The Court: Do you have any questions, Mr. Hawkins?

Mr. Hawkins: Yes, just one or two.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Darcy, do I understand you correctly that you state that Mr. Ashley did not furnish any fine graders for you? [2425]

A. Not as he stated; he brought fine graders up there to do the work under his instruction, having had a complaint from me as to specified holes and what was wrong.

Q. Whenever you complained he sent fine graders back, didn't he?

A. Not always; he didn't have them.

Q. In most every instance he did, didn't he?

A. Eventually, yes, as soon as he could get help he'd bring them.

(Testimony of Patrick L. Darcy.)

Q. Do you remember your testimony in the beginning of this case to the effect that fine graders were always under your feet?

A. On the latter part of the job, yes.

Q. Not on the first part of the job?

A. The first part of the job there wasn't any to be under our feet.

Q. Although he sent them back in most cases?

A. Just as soon as he could get them he'd bring them back.

The Court: Mr. Ivy?

Mr. Ivy: No questions.

Redirect Examination

By Mr. Olson:

Q. What did Mr. Ashley say, if anything, about giving you a statement? A. What?

Q. About sending a statement? [2426]

A. You mean over in Coeur d'Alene?

Mr. Holman: I object to that as immaterial and collateral, your Honor.

The Court: I think he can explain. You went into it. Overruled.

A. He said "I'll give you a statement as to the facts on which you've asked specific information, but I do not want to give a statement for any purpose until I have checked my notes and data on that job, so that I know I am right on the data I give"; and he agreed to mail it the first of the following week, after he had checked his note books and data to make the statement up.

(Whereupon, there being no further questions, the witness was excused.) [2427]

WILLIAM E. SCHAEFER

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Olson:

Q. Your name is W. E. Schaefer?

A. William E. Schaefer.

Q. Now, Mr. Schaefer, did you on or about the 20th day of April, 1944, out in the field of 1062, with Mr. Macri, state to Mr. Macri in going over the excavations that everything was all right?

A. I did not.

Q. Were you present when either of the sub-contracts were signed? A. No, I wasn't.

Q. Now, were you present on April 29, when Mr. Staples, or when Mr. M. C. Schaefer and Mr. Staples had the conversation which your brother, Mr. Schaefer, testified to relative to Mr. Staples' ability or inability to reach Mr. Macri on the previous day, April 28? A. Yes.

Q. Would you state what was said at that time?

Mr. Holman: I object to this, your Honor, as having been covered in the case in chief.

The Court: This is to the particular statement?

Mr. Olson: That Mr. Staples denied.

The Court: Mr. Staples denied?

Mr. Olson: Yes, that Mr. Staples denied on cross-examination.

The Court: Overruled.

Witness: That was at the job office, after that meeting; Mr. Staples told M. C. Schaefer and my-

(Testimony of William E. Schaefer.)

self, I heard it, right there, he says "I knew where Mácri was yesterday, [2428] but he told me not to call him unless I had to, and when you told me you was going to pull the men and equipment off the job if this excavation wasn't going to be any better, and get these holes ahead for us far enough so we could work, I thought I had to call him."

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. What time was this at that job office?

A. Sir?

Q. What time was this at that job office?

A. I'd say it was in the afternoon.

Q. What time in the afternoon?

A. I just don't remember what time it was.

Q. Now, what did you say when you told me what he said to Mr. Schaefer, when you told me, or what did you say Staples said to Schaefer?

A. When Schaefer told him?

Q. Yes.

A. That he was going to pull the equipment and men off of the job unless they got more excavations ahead of them, and that the excavations would be right, the fine grading.

Q. This was in April? A. April 29.

Q. Yes, sir. How large was your crew at that time, sir? A. Sir? [2429]

(Testimony of William E. Schaefer.)

Q. How large was your crew?

Mr. Olson: Whose crew?

Q. Schaefer's crew.

A. At that time the crew wasn't very large. I'd say approximately about 27, or 7, rather.

Q. You mean 7 instead of 27, don't you, sir.

A. That's right.

Q. And what your equipment at that time?

A. We had a skill saw and a band saw and a table saw in there.

Q. That was all, sir?

A. We had pick-ups and I believe one truck.

Q. How many——

Mr. Olson: I don't see the materiality of that. I went into what Mr. Staples said, that's all. He's going back now into the equipment. That means I've got to go back and show whether it was necessary to have any more equipment.

Mr. Holman: I've gone as far as I want to, your Honor. That's what you understood that day in that conversation would be pulled off the job?

A. That's right.

The Court: Any further questions?

(Whereupon, there being no further questions, the witness was excused.) [2430]

Mr. Olson: That concludes our rebuttal, your Honor.

The Court: Do you have anything further, Mr. Holman?

Mr. Holman: I would like to call Mr. Macri with reference to the matter of conversation in Mr. Ashley's office, since that's been brought in now, your Honor.

The Court: In Mr. Ashley's office?

Mr. Holman: Yes, the conversation as claimed to have been between Mr. Schaefer and Mr. Darcy and Mr. Ashley as to what Mr. Ashley told them Mr. Macri had said to him. If your Honor, please, Mr. Macri has never been interrogated about that.

The Court: Well, as I understand it, you're talking about the conversation up at Coeur d'Alene?

Mr. Holman: Yes.

The Court: Mr. Ashley was asked if he didn't make certain statements, by way of impeachment. He denied that he made them, and now the witnesses have testified he did make the statements. It doesn't seem to me that opens the door for either side to go into whether his statements were true or false. That was only for impeachment purposes.

Mr. Holman: That's all right, your Honor.

The Court: Is there anything else?

Mr. Holman: I have nothing, your Honor.

The Court: Do you have anything further, Mr. Hawkins?

Mr. Hawkins: No, nothing further.

The Court: Mr. Ivy?

Mr. Ivy: No, sir. [2431]

The Clerk: Before both parties rest I have four more exhibits I'd like to call to counsel's attention.

Mr. Holman: Your Honor, before the case is concluded, I'd like to re-offer Macri's identification

72, the blank form for bid bond, and I have no supporting evidence other than what occurred here in court, plus Mr. Schaefer's answers.

The Court: What is that?

Mr. Holman: That is the form of application by the Glen Falls Indemnity Company.

Mr. Olson: I have the same objection, your Honor, I've made each of the other three or four times that application has been offered.

The Court: The offer will be denied.

Mr. Holman: Then there was another identification, 120, your Honor, my own notes in my office in conference with Mr. Schaefer and the gentlemen who accompanied him on January 23, 1945.

The Court: That was offered and rejected once, wasn't it?

Mr. Holman: Yes.

The Court: Same ruling.

Mr. Holman: That's rejected, your Honor?

The Court: Yes. I assume you're still objecting?

Mr. Olson: My objections are the same, your Honor, [2432] that I made previously.

Mr. Holman: I'd like again to re-offer with respect to 1068 the field notes of the witness Black throughout the performance of that job, being Macri's identification 80.

The Court: Those are the field notes that Mr. Black, the engineer on 1068, made. For what purpose are they offered?

Mr. Holman: For the purpose of showing the progress of the job, and thereby supporting the

charges made against Mr. Schaefer and the Concrete Construction Company in the cross-complaint.

The Court: How do they sustain charges against Mr. Schaefer? This was after the work was started by Mr. Macri, and during its progress by Mr. Macri.

Mr. Holman: It's just a progress report, your Honor.

The Court: While the work was being done by——

Mr. Holman: Macri; yes, your Honor.

The Court: How would that affect whether or not Mr. Schaefer breached the contract?

Mr. Holman: I have this in mind, your Honor; much the same as a tenant abandoning a house.

The Court: As what?

Mr. Holman: As a tenant abandoning a house under [2433] a lease; the landlord is under obligation not to overload the condition, but to use his best efforts to avoid a loss to the opposite party, if possible, and that's what I had in mind this would show.

The Court: Well, you've shown what it cost you; there's no contradictory evidence on that. This doesn't go into the proof of the cost of your operation.

Mr. Holman: No, your Honor. It does show when the forms were set and what equipment was on and when concrete was placed in them, and its progress, and when it was completed.

Mr. Olson: Your Honor, I make the same objection I made previously. The document is self-serving, it is hearsay, absolutely no opportunity to

cross-examine concerning the contents of the document. He's offering it for the purpose of proving the contents of a written document made by one of their field force to their office. It is not competent evidence.

Mr. Holman: May it please the Court, there was every opportunity to cross-examine while Mr. Black was on the stand.

The Court: It wasn't offered while he was here, was it?

Mr. Holman: I think so; wasn't that offered while Mr. Black was here? [2434]

Mr. Olson: I don't know. My position is that even if it was——

The Court: It was rejected just yesterday.

Mr. Olson: Yes, it was.

The Court: That was the first time I recall.

Mr. Holman: It was identified at the time.

The Court: Well, I don't care about that, particularly. I'll sustain the objection. I don't believe it is material here.

Mr. Holman: Well, I'll withdraw it, your Honor, since it is part of our record, then.

The Court: All right.

The Clerk: I have a copy of 127 made up.

Mr. Holman: May the copy be marked 127 and I return to Mr. Olson the original, your Honor.

The Clerk: The same is true of Macri's 128.

Mr. Holman: And the same for that, your Honor; a copy has been made.

The Clerk: Macri's 14, which is part of the Bureau file, I have a copy made up of that.

Mr. Holman: This is the monthly estimates, complete. I'd like to have the copies substituted, your Honor, so that the originals can be returned.

The Court: That may be done.

The Clerk: The same is true of Macri's 20 on 1068. [2435]

Mr. Holman: The same thing, your Honor; it is the copy prepared by the clerk in lieu of the original.

The Clerk: And on 17-a, b and c; a is an exhibit, b and c are identifications which were rejected. That's made up out of this identification 17.

The Court: Did you have anything else, then, Mr. La Framboise?

The Clerk: Yes, sir, that's all of Mr. Holman's, I believe.

The Court: How about these files where the individual bills and vouchers were just identified and not offered in evidence? Are you withdrawing them?

Mr. Holman: No, I wanted to cover those, your Honor. I have had these marked and available for counsel throughout the case since production at their request, and I now offer each of these and the sub-numbers in evidence, namely Macri's 106 to 115, inclusive, with the request that the sub-numbers be marked by the Clerk as the basic supporting data for the compilation of the claim on 1068, specification 1068, and also Macri's 116, your Honor, the OPA regulation, price control, title 32.

The Court: Let's see; perhaps we had better take these one at a time and give Mr. Olson a chance to object [2436] or consent.

Mr. Olson: If your Honor please, I can make my objection to these as a group, Macri's identifications 106, 107, 108, 109, 110, 111, 112, 113, 114 and 115. All of these identifications are objected to on the ground that they have not been properly identified, that they're irrelevant and incompetent to prove any claim against the use plaintiff, M. C. Schaefer, or the Concrete Construction Company. They contain numerous notations written on in pencil, some of them in pen; I believe they are purely self-serving documents. They were used in cross-examination for the purpose of interrogating Miss Callahan as to the documents from which she made up Exhibit 91, and if these are offered, as I assume they are, of proof that that cost actually went into 1068, I submit they are not properly identified and not admissible for that purpose.

The Court: I don't see the advantage of propriety of encumbering the record with all of this detailed evidence. I thought that one of the reasons for offering Macri's 91, which was the summary made by Miss Callahan, was that the individual records on which it was based were voluminous and complex, and it wasn't practical to offer them in evidence directly, and therefore a summary would be received, providing the originals were available [2437] for counsel's examination and cross-examination, and now we're demonstrating that there wasn't any real reason for putting in this summary.

Mr. Holman: I don't differ from that position, but I still feel that it is my duty as part of Mr. Macri's case to make at least the offer.

The Court: Well, they've been here at all times, of course.

Mr. Holman: That's the point.

The Court: My conception of this is that the supporting data has been available, and counsel could have introduced or offered them if he chose to do so.

Mr. Holman: And he not doing so, I'll offer them.

The Court: Well, I'll sustain the objection.

Mr. Olson: I would like to have the record show that I do not object to their being in evidence for the sole purpose of showing that they are the documents from which the compilation, Exhibit 91, was made. For that purpose I would join counsel's offer, but as proof of their contents, it is that to which I do strenuously object, unless counsel is offering them for that limited purpose.

Mr. Holman: You can't blow hot and cold on them, your Honor.

Mr. Olson: No, I'm not blowing hot and cold.

Mr. Holman: I mean I can't; you can.

The Court: I'd be inclined to sustain an objection merely because of their voluminousness and encumbering the files, when a summary is in evidence showing at least a recapitulation of all their pertinent part.

Mr. Holman: Is that your Honor's ruling?

The Court: Yes.

Mr. Holman: I then make application to withdraw them for our permanent files.

Mr. Olson: I resist it, your Honor. I would like to have them available for use in argument.

The Court: Well, they have to be in or not in, it seems to me.

Mr. Olson: Well, I offer them for the restricted purpose, not as to their contents, but simply as showing the documents from which Exhibit 91 was prepared.

Mr. Holman: I offer them for all purposes.

The Court: They will be admitted in connection with 91, the testimony of Miss Callahan with reference to the cost of 1068.

Mr. Holman: And to avoid the very arduous duty of giving them sub-numbers, if I may again entrust them to the custody of the clerk with the request that they be not dis-assembled, it will save me a lot of work. [2439]

Mr. Olson: I take it counsel's admonition goes to both tables?

Mr. Holman: Everybody except you and me and Mr. Hawkins and Mr. Ivy.

Mr. Olson: How about the Clerk?

Mr. Holman: Don't be facetious.

The Court: Well, I think they can be put in as they are, and the clerk can give them sub-numbers. Some of them have already been marked, haven't they?

(Whereupon, defendant Macri's Exhibits for identification numbered 106 to 115, inclusive, were admitted in evidence.)

Mr. Holman: I'd like, then, to offer in amplification of Miss Callahan's testimony, Macri's identification 116, being an Office of Price Administration issue under Title 32 of part 1399, Construction, Oil Field, Mining, and related machinery, regulation 134 with respect to prices.

The Court: Do you have any objection?

Mr. Olson: I have no objection to it going in in connection with Miss Callahan's testimony. I don't know about the amplification.

The Court: It will be admitted in connection with her testimony.

(Whereupon, defendant Macri's Exhibit No. 116 for identification was admitted in evidence.)

Mr. Holman: Your Honor, I am confronted with a copy which came through counsel Hawkins, or rather through Mr. Goerig, to counsel Hawkins and through him into the possession of the Clerk, of what is headed "War Contract Hardship Claim for Macri and Company, Seattle, Washington" upon which Mr. Macri has been interrogated upon the stand, and I find it neither marked for identification or otherwise in this case.

Mr. Hawkins: We're not offering it in evidence, your Honor. It is in the first place a copy of a copy, a rather tenuous authenticity; then, too, I find the claim isn't exactly what I expected it to be.

The Court: Who does it belong to?

Mr. Hawkins: It belongs to anybody who wants it. The copy from which it was prepared belonged to Mr. Macri's other attorneys.

The Court: Has it been marked for identification?

Mr. Hawkins: No, it's never been marked or offered.

The Court: Then there is nothing for us to do.

Mr. Holman: Only this; the record I am sure shows rather stringent cross-examination by Mr. Hawkins with respect to this being prosecuted, and there was a long delay——

Mr. Hawkins: There was no long delay. It's been [2441] in the hands of the clerk since about the 27th of February.

The Court: That was in the prior cases, the first day we started?

Mr. Hawkins: That's right.

Mr. Holman: The only concern I have, if counsel Hawkins now will make the statement that so far as these two cases are concerned it is not competent or pertinent, that is all I'm interested in.

Mr. Hawkins: That's all right; I'm not offering it.

Mr. Holman: May it be marked for identification, to show what the ruling is, or what shall we do with it?

The Court: Well, it has never been marked. The record may show it was here in court, and that no one chose to offer it.

Mr. Holman: I think I'll return it to Mr. Hawkins.

The Clerk: Now on Mr. Olson. Plaintiff's identifications 52, 53, and subdivisions of 53, a to h, inclusive, have not been offered, but were produced here in court and marked for identifications.

Mr. Olson: Your Honor, these two exhibits I think were in the same category as some of those last ones. These two identifications were put in for the [2442] purpose of examination of counsel if he wished to do so in connection with certain graphs which we put in, but I will for the purpose of the record offer plaintiff's identification 52 and all of plaintiff's identifications 53, including all of the sub-identifications.

The Court: Do you have an objection?

Mr. Holman: No objection, your Honor.

The Court: I question again that all of those things should go in here. We've got a record that's going to be tremendously voluminous, and, of course, I suppose you don't have to take up any more of this than you want to on appeal.

Mr. Hawkins: Well, I'll make an objection. I haven't really examined those documents, I don't know what's in them, but I do know that there is a certain amount of self-serving statements in there, so I'll interpose an objection on those.

The Court: The objection will be sustained. We seem to have difficulty getting an objection here. It was quite the reverse at the beginning of the trial.

Mr. Olson: I'm really surprised that Mr. Holman would consent that these notations on the superintendents' reports could go in. They are really quite good. May we withdraw, then, identification 52 and 53 with all of those subdivisions?

The Court: Yes, they may be withdrawn.

Mr. Olson: I have not offered, I believe plaintiff's identification 119, which is the monthly cost

statements of Mr. Schaefer addressed to Mr. Macri, and those statements were the ones that were referred to in the letter to which your Honor has already sustained an objection.

Mr. Holman: I do object to these, your Honor, as having been affirmatively shown by the witness Schaefer himself as not having been sent currently, and having been transmitted to his attorney, Mr. McKelvey.

The Court: Let me see that. I think I know what it is. Yes, I'll sustain an objection to this 119.

Mr. Olson: Now on plaintiff's identification 83, I was under the impression that I had offered that and it had been rejected. If the record does not show it, I'll re-offer plaintiff's 83, which is a written statement of James A. Black, offered in connection with our cross-examination of James A. Black when he was called as a witness for the defendants.

Mr. Holman: My notes of that show that it was offered, and as I understood, it was rejected because your Honor rules it was not inconsistent with Mr. Black's testimony and therefore it would not be competent evidence.

The Court: It seems to me I did rule on that.

The Clerk: My note is that it wasn't offered, and Mr. Olson refused to offer it, and suggested to Mr. Holman that he offer it, so that he could cross-examine without offering it.

The Court: Well, let's see; you called Mr. Black, didn't you?

Mr. Olson: I called Mr. Black.

The Court: And then Mr. Holman asked for this statement, and it was produced. I don't believe this was ever used for impeaching purposes. I'll sustain the objection to it.

Mr. Olson: We offer in evidence, your Honor, plaintiff's identification 118, being a letter of Mr. McKelvey to Mr. Tom Holman, indicating the transmission to Mr. Holman of a claim of some sort of the Concrete Construction Company against Mr. Macri.

Mr. Holman: You haven't the claim attached.

Mr. Olson: No, I have not. That letter was handed to me out of your file.

Mr. Holman: Well, there is no question I got the letter, your Honor; I recognize it, and I got it out of my file and handed it to counsel. It refers to a statement attached. I think that's already been covered between counsel and me, that it is one of these two statements, one pertaining to \$35,000.00 worth of [2445] claim, and the other one raised to about \$45,000.00. I'm referring to exhibit 68.

Mr. Olson: You were of the opinion that 68 was the one; now, I don't know what it was.

Mr. Holman: I don't know whether it has any probative force, your Honor.

The Court: It doesn't seem to me that without the statement to which it refers it would be of any probative value, unless you wish to show some sort of claim was made on the 9th of March.

Mr. Olson: That's the only thing I can see it is worth.

The Court: Well, it will be admitted for what it is worth.

(Whereupon, plaintiff's Exhibit No. 118 for identification was admitted in evidence.)

Mr. Olson: If we haven't already done so, we rest, your Honor.

(Discussion about time for argument.)

Mr. Holman: Your Honor, in advance of argument, I would like to renew the motions at the end of the case that I had at the beginning of the case, namely, I would move at this time that the plaintiff's complaint in chief be dismissed and he recover nothing on that ground, and for the reason that there is a failure to comply with [2446] the requirements of the sub-contract, 1062-1, exhibit number 5, wherein it is required that there must be written notice given of any claim for delays within the period fixed by that instrument, and the proof affirmatively shows that that was not done. The next motion I wish to make is that the plaintiff recover nothing either in the case in chief or in the cross-complaint—or, pardon me—either on his claim for damages in specification 1062 or 1068, on the ground and for the reason that there has not been a compliance with the laws of the State of Washington, which would govern in this Court, and this District, requiring the filing of a certificate of assumed trade name in advance of commencement of trial, and on that your Honor will recall that the record is at present showing an amendment to the pleadings that the certificate was filed after the case commenced, and a correct filing was denied by all the parties adverse to the plaintiff. I have those two motions.

The Court: The motions will be denied.

Mr. Hawkins: For the purpose of the record the defendants Goerig and Philp challenge the sufficiency of the evidence and move the court for an order granting a non-suit as to plaintiff's case, the case of M. C. Schaefer, doing business as the Concrete Construction [2447] Company, with respect to specification 1062, and also plaintiff's case with respect to 1068. We also join in counsel's motion for a dismissal for the reason that the plaintiff has not shown compliance with the trade name statute of the State of Washington.

The Court: The motions will be denied.

Mr. Hawkins: Oh, we also move that Macri and Company's cross-complaint against Goerig and Philp and the Continental Casualty Company's cross-complaint against Goerig and Philp be dismissed for failure of proof.

Mr. Ivy: I desire to renew the motion on behalf of the Continental Casualty Company for dismissal of them from the action, and challenge the sufficiency of the evidence, and ask that the case be dismissed as to the Continental Casualty Company.

The Court: The motions will be denied. It seems to me that it would be impossible under the state of the record here for the Court to make any final adjudication as to the application, if I might call it that, of Mr. Macri for judgment against Goerig and Philp. That controversy isn't fully presented here, as I see it, at the present state of the record.

Mr. Holman: Not the complete loss on the job is not presented, no. [2448]

The Court: Not the complete loss on accounting, because as between Goerig and Philp and Mr. Macri under the termination agreement Goerig and Philp agree to pay a certain proportion of Mr. Macri's losses, when they're determined, and of course the loss hasn't been shown on either 1068 or 1062 so far as Macri is concerned. There isn't any question about that?

Mr. Holman: Nor could it be shown without determination of these actions.

The Court: No; it will require a separate accounting, so the controversy is largely between Mr. Schaefer and the other defendants here.

Mr. Hawkins: I think that's correct. I think there probably will be an issue between ourselves and the bonding company, but I don't think it will take more than five minutes to state our facts on that. You see, the bonding company has asked judgment against Goerig and Philp.

The Court: Yes, I appreciate that.

(Whereupon, counsel Olson presented his final argument to the court.

(Whereupon, the Court took a recess in this cause until Friday, March 21, 1947, at 9:00 o'clock a.m.)

Yakima, Washington, Friday, March 21, 1947,
9:00 o'Clock A.M.

(Whereupon, all counsel presented their
final arguments to the Court.)

Court's Opinion

The Court: Mr. Olson, I think I might save time here by announcing the Court's views, and then I'll give you an opportunity to be heard on those points on which my ruling is adverse to you or your client, Mr. Schaefer.

I necessarily will have to deal with these issues generally, and what I am trying to do is to lay some reasonable basis for the drafting of the findings of fact and conclusions and the various judgments that will have to be entered.

Taking up first Mr. Schaefer's suit against Mr. Macri on sub-contract 1062, the arrangement there was that Mr. Schaefer was to construct the concrete structures in place, furnishing certain materials that were listed in the sub-contract. Mr. Macri agreed to furnish the form lumber and to do the excavation work. The specifications that are in evidence here pertain, or do not contemplate, I should say, any sub-contracting of a part of this work. They naturally pertain to the work of the general contractor under his contract with the government, and they provide that the government will pay for excavations in those instances where clearance is required in the excavations, the removal of common earth one foot out from [2451] the

base of the concrete structure and on a slope of one to one. The government naturally was concerned wholly with the matter of payment, because since they required only that these structures be built and installed according to specifications in the places specified by them, it didn't make any difference to them how much excavation the general contractor might make or might not make. All they required of him was that he put in the concrete according to their requirements, but here we have a dividing of the work, not, certainly, directly contemplated by the specifications, where the contractor is to do the excavating, and the sub-contractor is to build and install the forms and pour the concrete.

In that case there would be an implication, certainly, that the excavation was to be done in such a way as to afford reasonable clearance, a reasonable opportunity for the sub-contractor to properly and efficiently and without undue expense put his forms in the excavation and carry out his part of the work.

It is the view of the court that the pay provisions of the specifications as to clearance and slope are not absolute requirements. I do not believe that they obligated Mr. Macri to cut the banks to a slope of one to one in those instances, as I have said, where clearance was required, where a form had to be placed between the concrete and the bank, but I think that they are very persuasive as to what would be [2452] reasonable. The Reclamation Bureau, with its long experience in construc-

tion of this kind, I assume wouldn't pay for more excavation of more dirt than was reasonably necessary for the contractor to install his form, so I think the best evidence we have, the best indication we have, as to what was reasonably required is the fact that the Reclamation Bureau would pay for dirt excavated one foot out at the base and on a slope of one to one.

The evidence is overwhelming that excavation was not made in that manner. It was made, the Court finds, approximately one foot out from the base, with practically vertical banks; that is, with only the slope that would naturally result from the excavation by the use of Macri's hoe type shovel. A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macri's superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and that's not at the base, it was at the surface, so there was no effort on Mr. Macri's part to excavate out one foot, and it seems to me equally obvious, aside from the testimony in [2453] the case, that that was not reasonable and proper clearance in the structure and form. We have in evidence here there are between the concrete and the outer

bank the ship-lap, which I assume would be approximately an inch thick, less whatever is planed down, the two by fours forming the framework, and then what's been referred to, I think, as the strong-backs, an additional two by four there, which makes approximately nine inches of form outside of the concrete, so that a foot would give only an additional clearance of three inches, which obviously isn't sufficient regardless of the manner of operation of this so-called she-bolt or clamp, or whatever it may be; and the court finds that the excavation was not done in a manner to give sufficient clearance, that there was not sufficient slope, there was not sufficient width in the excavations to enable the sub-contractor to efficiently and properly install his forms, and that he was delayed and hindered in the progress of the work, and that his carpenters installing the forms had to make extra excavation, and that this was the rule rather than the exception in the progress of the work.

In that connection, I find also that the fine grading was not done according to the layout plans and specifications, that it was defectively and improperly done, and that in most instances the carpenters had to do the fine grading before they could install the forms, and that that also increased [2454] the amount of work Mr. Schaefer had to do, and hindered his progress and interfered with his progress of the work.

I also find that the excavations were not made on time and in an orderly sequence and manner, so

as to unable the sub-contractor to proceed as he should have been able to do with prompt progress of the work.

Now, with reference to the lumber which Mr. Macri was to furnish under the sub-contract, I find on the evidence here that sufficient lumber was not furnished; it was not furnished on time, and the quality was not proper and suitable for the work intended. It is true, I think, that there was some lumber there most if not all of the time during the progress of the work, but much of the time there was missing some essential type of lumber, such as the two by fours or the ship-lap or some particular kind of lumber or plywood required, so that the work was hindered and delayed because of the lumber not being promptly furnished, not furnished in sufficient quantity, and not furnished in the quality that was the minimum requirement, I should say, for work of this kind.

I make that finding despite Macri's identification 104, because I think Miss Callahan testified that she had been told what bills to put in here; she made up that exhibit from the invoices that had been sent in by people furnishing lumber. She didn't know whether the lumber went on the job or not, and took the invoices at the direction of somebody [2455] else, and then Mr. Klug testified that that was the kind of lumber that could have been used on this job; my recollection of the testimony is that he didn't say that this particular lumber was used, but it was the kind that could have been used on the job, and I think Mr. Klug

on the stand tried to minimize the situation with reference to the shortage of lumber. I think his statement more clearly represents the fact that there was a shortage of lumber, as he said in his statement.

In short, the court finds that Mr. Macri breached the sub-contract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.

I think that the conversations between Mr. Macri and Mr. Schaefer were substantially as testified by Mr. Schaefer and his witnesses. I think that on these occasions mentioned Mr. Schaefer complained, and in that connection Mr. Schaefer complained, he or his men complained, repeatedly and frequently to Mr. Macri and to Mr. Macri's agents on the job, and Mr. Macri [2546] had notice of these complaints. He had notice and knowledge of his failure and his agents' failure to perform the contract according to its terms; that he accepted and acted upon oral complaints and notices to that effect; that he knew of the condition, and that he waived any and all requirements as to written notice contained in the contract, by his conduct.

Coming back to those conversations, it is the view of the Court that Mr. Schaefer did complain, and stated that he would pull off the job, or in effect, that if conditions weren't improved, and that Mr. Macri on several occasions promised that he would do better, and that he would see that things were done in accordance with the requirements of the contract, or in a proper manner, and that he did tell Mr. Schaefer substantially as Schaefer and his witnesses testified, that if he would go on and complete the contract, he wouldn't lose anything on the contract, nobody had ever lost on his contracts, and that he would make it right and pay him for what he might lose under the adverse conditions created.

However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and [2457] with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct

isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.

However, I think that Mr. Macri did by his representations induce Mr. Schaefer to go on, by his promises that the bad conditions would be remedied. I think that Mr. Schaefer did go on by reason of these representations, and performed this work, which was accepted by Mr. Macri and which went into the job, and that under the circumstances it would be extremely inequitable for Mr. Schaefer not to be paid the fair and reasonable value of his services. In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach.

Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, [2458] 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration. This act, which the courts have

said numerous times should be liberally construed, because of evidences and intent on the part of Congress that all persons furnishing labor and materials that go into public contract work should be fairly and reasonably compensated for their services, is very closely analogous to the public improvement statutes of the State, and as I read the cases, while there is none that is squarely in point with this one in its facts, the implication of the decisions of the Washington State Supreme Court and the language employed indicates that that court subscribes to rules similar to that applied in *Susi vs. Zara*, that where the contract is breached by the main contractor, the sub-contractor is then entitled to the fair and reasonable value of his services rendered in performance of the work, and that that includes an appreciation of the amount necessary to spend by reason of the breach, including delay occasioned by the main contractor.

The *Susi* case, as has been pointed out, is not squarely in point here, perhaps because there the contract was never [2459] completed by the sub-contractor, and the question was not decided as to whether the sub-contractor in recovering the fair and reasonable value of his services could go entirely beyond the total amount of the bid price provided in the sub-contract. In the *Susi* case, the main contractor took over the contract when it was partly performed, and made it impossible for the sub-contractor to complete it, and the court held that the sub-contractor could recover for the reason-

able value of the work and services performed up to that time, and was not bound by the unit prices of the contract, and could recover against the bonding company. I think the thing that makes the Susi case applicable here was that here we have a continuing breach. There was a completion of performance, it is true, but there was a breach right up to the last day of the work, by Mr. Macri; there continued to be a breach, and therefore I think the principle of the Susi case would apply.

Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work, and since the recovery is not for damages for contract, but for the fair and reasonable value of the services, I think under the decisions of the State court that Mr. Olson cited here and were cited in his brief, that the sub-contractor is entitled to recover on that basis against the bonding company also. [2460]

The case that hasn't been cited here, and is very closely analogous to this one as to facts, McDonald vs. Supple, an Oregon case, 190 Pacific 315, I think deserves attention. It is, of course, only persuasive, as the Pennsylvania Federal District Court case is persuasive, not controlling, but it appeals to me as being equitable, and squares fairly well with what the Supreme Court of the State of Washington I think has indicated as its view in cases of this character. In McDonald vs. Supple there was a government contract to construct dredges by the sub-contractor, parts and materials to be furnished

by the main contractor. The sub-contractor brought suit on the theory that there had been an oral modification of the written contract. The lower court held that there had not been an express modification of the written contract by oral agreement. The plaintiff then amended, alleging that there had been an implied modification by implied agreement, to pay the fair and reasonable value of the work done and required to be done by reason of the breach of contract on the part of the main contractor.

The court held first that there was no inconsistency between an allegation of an expressed oral modification and an allegation of an implied contract to pay the fair and reasonable value, and overruled a demurrer to the amended complaint. The court also sustained recovery on the basis of the fair and reasonable value of the services, and the amount [2461] and value of the work to be done by the sub-contractor was greatly increased in that case because of circumstances closely analogous with those in this case, that is, that the materials to be furnished by the contractor were not furnished in time, nor in an orderly manner: they were defective; the sub-contractor had to have a large crew of skilled workmen standing by; they couldn't work efficiently because of the breach of the contract on the part of the main contractor. The court on page 317 of the opinion states:

“The amended complaint averred, and the testimony on behalf of the plaintiff tended to show the defaults on the part of the defendant

Supple in the performance of the original contract were so numerous and so vital that they caused the plaintiff Wakefield to perform his labor under different conditions, at a different time, and in a different manner than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon that plaintiff Wakefield was not required to accept the compensation fixed in the original contract as the measure of his recovery, but by reason of the important changes in the work to be done, and the defaults on the part of defendant Supple in his performance of the contract, plaintiff is entitled to recover in addition to the contract price, such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant."

And again on page 318:

"The testimony on behalf of the plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been if the material had been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover on quantum meruit."

(Cases cited.)

This paragraph is also rather interesting; it throws light on one of the controversies in this case, continuing on the same page:

“Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through.”

Now, as I say, of course that case isn't controlling; it is merely persuasive, but it appeals to the court as appropriate, and not, certainly, in conflict with the announced decisions of the Supreme Court of the State of Washington. Now, I should say too, of course, that the bonding company was not involved in the Supple case, but it seems to me that it logically follows that if recovery is allowed on quantum meruit, that is, for the fair and reasonable value of the services that go into the work, that it isn't damages, as was held in the Pennsylvania case, but is for work and services that entered into the work, and that the bonding company should be held to compensate for the work and services.

Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the sub-contract as to the price of the work to be performed. If a general contractor makes a sub-contract to do a part of the work for twice its reasonable value, the bonding company isn't bound by that contract, and conversely, it seems to me they should not be able to claim the price in the sub-contract to their benefit, where the reasonable value of the work and services under the [2464] circumstances that they were actually performed exceed the contract price.

Now, that brings us to the question of the amount which Mr. Schaefer is entitled to recover. The plaintiff's exhibit 63, which is the plaintiff's statement of costs on this work, I think forms a fair basis for determining the amount of recovery. However, I'll say at the outset that it is the view of the court that plaintiff is not entitled to recovery of interest prior to the entry of judgment. It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court, so that the view of the court is he's not entitled to interest prior to the date of judgment. \$57,618.87, and from that I think should be deducted the legal expense of \$533.57, and the engineering expense of \$201.25.

I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should, because it is a part of the fair and reasonable value of this work. A carpenter doesn't just go out by himself and build forms, or the workman pour concrete. He does it under the direction and aid of an established [2465] business organization, and all of the expenses of that organization, including general overhead, go into the work. The item of profit is another troublesome one. However, as I recall, in the Denny Regrade case a profit of fifteen per cent was allowed there on one of the extra items, to Vigilante, I believe it was, on the transporting of the dirt to the place where it was dumped in Elliott Bay. At any rate, I'm inclined to allow \$57,618.87, less the two items mentioned, for engineering services and legal expense.

The bonding company is entitled to judgment back against Macri for the amount and costs and a reasonable attorney fee. It is difficult to make a compromise or adjustment between what should be paid for a long, drawn-out case of this magnitude, with the amount involved, and some consideration for what the traffic should be required to bear in the way of the burden imposed upon the losing parties here. I am inclined to think that while it would not be adequate under other circumstances, that fifteen hundred dollars would not be unfair or out of the way. Have you any suggestion on that, Mr. Ivy? I would welcome a suggestion if you wish to make it, before I definitely fix an attorney fee.

Mr. Ivy: Your Honor, in my brief I left it to the discretion of the court.

The Court: Yes, I know you did. Well, that's the amount the court determines. Now, we come to the question of [2466] whether the bonding company can recover judgment back against Goerig and Philp. I'm inclined to think they can. I haven't my notes here. I find myself somewhat in the position of a man who gets chlorine gas. He drowns in his own secretion. I'm almost at that point with my notes I have taken. I haven't my notes here, but I have a general statement of the law as to dormant and silent partners. This joint venture creates a situation that I think we can, for the purpose of this case, say is analogous to a partnership. Once you establish joint venture, about the only difference between it and a partnership is the difference in the scope of the two as to what business and activity is covered, but here we have a situation analogous to that of a partnership, in which two of the partners, Goerig and Philp, are dormant or silent partners, and the statement of the law which I have in mind is from *Corpus Juris*, to the effect that the liability of a dormant partner prior to dissolution of the partnership, on any contracts entered into by one authorized to do so for the partnership, and within the scope of the business, the liability of a dormant or silent partner does not depend upon knowledge of the third person to the contract or dealing with the same, of the existence or relationship of the silent partner; that it depends upon the silent partners being parties

to the authorized contracts of the partnership, and further based upon a consideration of public policy because it would open the door wide to chicanery and fraud if people were permitted to make secret agreements as to their liabilities which they could change at will to the detriment of third persons, so that the liability does not depend upon the fact that the person dealing with a firm knows of the existence of a silent partner and depends upon his credit.

If the partnership enters into an authorized contract during the existence of the partnership, the silent partners then become members of that partnership, or become parties to that contract, the same as if they had personally signed it, and are bound until they are released in a way by which parties can ordinarily be released from their contracts, and here I consider it immaterial that as to 1062 the bond application was actually signed prior to the execution of the joint venture, because I think a partnership may adopt, as this one expressly did, may adopt prior contracts of one of the parties just as they may be bound by subsequent contracts, and I think here under the circumstances and the wording of this joint venture, that the parties did expressly or by implication adopt the contract of Mr. Maceri with the government on 1062, and with the bonding company on the application for the bond on 1062, and of course, the bonding company having once been bound continued to be bound. Its obligation was fixed and determined, and what remained then [2468] was to just ascertain the

extent of the liability of the bonding company, in the light of subsequent events. The bonding company couldn't release itself once it had executed the bond, and therefore I think Goerig and Philp became bound under the indemnity contract, indemnity against loss, contained in the application executed by Mr. Macri.

As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important. I don't think they are, because it is a quasi-contract arising after the contract terminating the joint venture. That contract, still carrying the analogy of the partnership, I think dissolved the partnership; it terminated it, brought it to an end. The only thing remaining then was a contract that Goerig and Philp would reimburse Macri under certain circumstances, for a portion of his losses, and I don't believe Goerig and Philp should be liable for any contract entered into in the name of this joint venture, or by Mr. Macri operating for it, subsequent to the date of the agreement terminating the joint venture, and as I view the theory of this case, and the theory upon which I decide it, that contract, quasi or implied [2469] contract, arose out of conduct that was subsequent to the termination agreement.

I am announcing these things, Mr. Olson, as I stated at the outset, with the understanding that in any points where my decision is adverse to your client, you will have an opportunity to be heard before my ruling becomes final. I thought it might save time if I just announced what I had in mind here.

Mr. Olson: It undoubtedly has, your Honor.

The Court: Is there anything that I've overlooked here, between one party and the other?

Mr. Holman: I call your Honor's attention to the fact that Macri affirmatively pleaded——

The Court: Oh, yes, 1068, you mean?

Mr. Holman: Oh, no; Macri affirmatively pleaded and proved the levy by the United States arresting any funds in the hands of Macri that might then be due to Mr. Schaefer, and Mr. Schaefer admitted on the stand that that had not been paid, so I think that's an issue here and we're entitled to that protection.

The Court: Well, it isn't directly before the Court here. This court can't decide now whether Mr. Schaefer owes the government ten thousand dollars, or whatever it may be, or whether he doesn't owe them. This notice of levy is in the nature of or might be analogous to a writ of garnishment [2470] against you.

Mr. Holman: Yes, your Honor, and we've pleaded that, and Mr. Schaefer has admitted the obligation is still due, and it's not been denied.

Mr. Olson: Mr. Schaefer said he had not paid that to the government, that's all.

The Court: But he hasn't admitted liability on it, as I understand it. Well, it seems to me about the only thing I can do here is to provide that any action to enforce collection of this judgment as to Mr. Macri, to the extent of the amount shown in this, shall be stayed until determination of this controversy.

Mr. Holman: That's my idea.

The Court: That will protect your client from the payment of that part of the judgment, and when I asked if I had overlooked anything, I meant as to 1062. I haven't, of course, got to 1068 yet.

Mr. Ivy: One matter I wasn't clear about in 1062. You made a statement that the bonding company would only be liable for the fair and reasonable value of the services under quantum meruit that had been allowed against the principal contractor, but not in excess, I understood, of the contract. You were discussing the amount of the value, the extent of the contract.

The Court: No, I didn't intend to make any such statement [2471] as that. I'm glad you called it to my attention, because I had overlooked saying that the court finds that the fair and reasonable value of the work and services performed and materials furnished by Mr. Schaefer in the prosecution of the work contemplated by specifications 1062 is the amount shown in his exhibit 63, plaintiff's exhibit 63, with the exceptions noted of interest and attorney fees and engineering service. The court finds that is the fair and reasonable value of the work and services performed under the cir-

cumstances created and existing by Mr. Macri's breach. Now, as to 1068, the court finds that there was a breach of that contract by Mr. Macri.

Mr. Olson: I hesitate to interrupt, but that item of fifty seven thousand, that's after, of course, there has been credited on the——

The Court: I see what you have in mind. I didn't mean to use that particular item. I'm glad you called that to my attention. The court finds that the fair and reasonable value of the work and services are as stated in this exhibit, prior to the application of the amount paid, with the exceptions I have noted already.

As to 1068, the court finds the defendant Macri breached that contract; at the time he called upon Mr. Schaefer to perform, there were no excavations there, and even up to the time he gave notice he was taking it over, there had never [2472] been any excavations fine graded and ready to receive forms. It would have been impossible for Mr. Schaefer, and was impossible, for him to comply with the demand that he proceed with 1068. However, under the circumstances existing here, the court is of the view that the showing of damages by way of loss of prospective profits is too speculative and uncertain and vague to warrant a recovery on the part of Mr. Schaefer. It's true that there is evidence as to what this work could have been done for, but looking at it broadly, the court must recognize Mr. Schaefer had lost a lot of money on one contract; he was still engaged in that contract under an arrangement where he had to continue regardless of the difficulties encountered; his equipment

was tied up, and continued to be until about March or April, 1945, I believe, and under the circumstances it doesn't seem to me that there's a showing here that Mr. Schaefer could have arranged for, bought or rented additional equipment, could have come on here and made a profit on this work, assuming, and I'm not too sure about that, that prospective profits could be recovered in a case of this kind.

The judgment of the court will be, therefore, subject to hearing counsel on the matter, that Mr. Schaefer should recover one dollar nominal damages against Macri only on 1068. Now, if you wish to be heard, Mr. Olson, I think you have some time left. [2473]

(Argument by Mr. Olson)

The Court: Well, I know it is a close and difficult question, but I'm still of the view that there wasn't a substantial beginning of the performance of this contract until about the 31st of July, as I remember, or the first of August, when they started pouring concrete, and while the conduct of Mr. Schaefer, or Mr. Macri, I mean, would relate back to those conversations, I don't regard any one of them as of final and controlling importance. I think the conversations, taken with the continuing breach by Mr. Macri, and his conduct, gave rise to a situation where Mr. Schafer was entitled to compensation for the fair and reasonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way,

that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time in the way of preparation in the light of the breach by the other party. I just wanted to make that clear.

I might say that I always try to keep my mind fixed so it can be changed on occasion, and I shall go over these briefs that have been submitted. I haven't had sufficient time to properly digest Mr. Ivy's brief, although he went into it to some extent in his argument, and I just received Mr. Holman's last brief, and I'll go over these, and I don't want [2474] to re-hash this whole thing over again. I'll consider all of these points, and if I come to some different conclusion in whole or in part, will advise counsel prior to the time that the findings and judgment are entered. [2475]

Reporter's Certificate

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington.

That the above and foregoing, consisting of four volumes with pages numbered consecutively from 1 to 592 (exclusive of this page) contains a full, true and accurate transcript of the testimony of M. C. Schaefer, Allyn R. Hunter, and Lawrence E. Bufton, and of the Court's oral opinion, including all objections and the court's ruling thereon.

Dated this 24th day of July, 1947. [2476]

* * * * *

That the above and foregoing, consisting of one volume with pages numbered consecutively from 594 to 799, (exclusive of this page) contains a full, true, and accurate transcript of the testimony of William E. Schaefer, Fred Waltie, and L. R. Hendershott, including all objections and the court's ruling thereon.

Dated this 30th day of July, 1947. [2477]

* * * * *

That the above and foregoing, consisting of eight volumes with pages numbered consecutively from 1 to 1555 (exclusive of this page) contains a full, true and accurate transcript of all of the proceedings in said trial as ordered by counsel, and when considered in conjunction with the transcript previously prepared and filed in this cause consisting of typed pages 1 to 799 inclusive, constitutes a full, true, complete and accurate transcript of all proceedings in said cause, including all objections and the Court's ruling thereon.

Dated this 25th day of October, 1947. [2478]

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

DEPOSITION OF CLYDE PHILP

CLYDE PHILP

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Holman:

Q. Will you give your name, please?

A. Clyde Philp.

Q. You live where, Mr. Philp?

A. At 2933 - Second Avenue, Seattle, Washington.

Q. Are you willing, Mr. Philp, that this deposition which is being taken may be transcribed without your reading the completed copy and without your signature thereto under the Federal Rule?

A. Yes.

Q. So you waive that, do you? A. Yes.

Q. In the records? A. Yes.

Q. What is your relationship—contractual relationship with respect to the Roza Work performed by Macri & Company involved in this action, being Bureau of Reclamation, Department of Interior, contract 12r14996, including specification No. 1068 for performance of earth work, pipe line, structures, laterals, sub-laterals, Roza Division, Yakima Project, Washington, according to the terms and specifications contained in said contract and particularly in accordance with specification 1068 and with respect to Bureau of Reclamation, Department of Interior Contract No. 12r14825 for earth work, pipe lines and structures, laterals 5.3 and 69.8 and sub-laterals, Roza Division, Yakima Project,

(Deposition of Clyde Philp.)

Washington, with specifications No. 1602, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specification 1062. Is that question clear, Mr. Philp? A. I believe it is. [2479]

Q. All right, what is your answer?

A. Whatever contractual obligation, if any, is contained in the agreement entered into between Macri & Company and Goerig and Philp in July, 1944.

Mr. Holman: Counsel Brown, I call for the production of that.

Mr. Brown: I haven't the original of that.

Mr. Holman: All right. Maybe I can identify it.

Q. (By Mr. Holman): Is that the agreement contained in the answer and cross-complaint of the Defendants Macri as specified in the cross-complaint of the Defendants Macri as the one signed between you and them and a signed copy in your possession, Mr. Philp?

Mr. Brown: Here it is.

Mr. Holman: You have a copy?

Mr. Brown: Yes.

Mr. Holman: All right. I will have him identify it.

(Discussion off the record.)

Q. (By Mr. Holman): Your counsel has produced a copy of that agreement to which you referred? A. That's right.

Mr. Holman: Will you mark it for identification, please?

(So marked.)

(Deposition of Clyde Philp.)

Mr. Brown: That is a copy of the contract that was served and filed under order of the Court as a part of the bill of particulars.

Q. (By Mr. Holman): Mr. Philp, I hand you Defendants' and Cross-Complainants' Exhibit 1 for identification, marked in your deposition today, consisting of five typewritten pages, numbered 1 to 5, inclusive; that is the instrument to which you refer, in view of your Counsel's stipulation, is it?

A. That's right.

Q. Now is it or is it not a fact that by reference to the contents of this identification 1, there is incorporated by reference an agreement [2480] between Sam Macri, Joe Macri and Don Macri, co-partners doing business as Sam Macri & Company, as first party, and A. J. Goerig, an individual, as second party and Clyde Philp, an individual, as third party, referring to the above contract No. 12r-14825, specification 1062, and also the additional agreement of December 11, 1943, referring to earth work, pipe lines and structures, laterals 70-1 to 80-1 and sub-lateral, East Turbine Laterals, station 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington?

A. There is mention made of those two in the agreement of July 15, 1944.

Q. And those prior agreements were executed between the parties that I have indicated, including yourself?

A. That's right.

(Deposition of Clyde Philp.)

Q. Is there any other written agreement or any other writing in any other manner affecting the two latter agreements that I have called your attention to, other than the one you have identified as Defendants' and Cross-Complainants' Exhibit 1 for identification? A. Not to my knowledge.

Mr. Holman: I call on Counsel Brown to produce any such if they are now available.

Mr. Brown: Any such——?

Mr. Holman: Other than this.

Mr. Brown: As far as I know there is nothing else in writing.

Q. (By Mr. Holman): Then it is a fact, is it not, Mr. Philp, that the two agreements of December, 1943, to which I have directed your attention, and Defendants' identification 1, is the total written contractual relationship between you and the Defendants and Cross-Complainants Macri with respect to these jobs that I have indicated?

A. I believe that is right.

Q. What was the relationship between you and the Defendant and Cross-Complainant, A. J. Goerig, at the time of execution of the instruments I have previously indicated to you in December, 1943?

A. We were partners on some jobs——

Q. I am speaking with respect to these jobs.

A. We each had an individual interest in this job.

Q. As indicated by those——

A. As indicated by the joint venture agreement signed December 11, 1943.

(Deposition of Clyde Philp.)

Q. What if any money have you, Clyde Philp, paid into the performance of the two Federal Projects I have indicated in the previous questions?

A. I would not know until there is a full accounting on the Stadium Home Project.

Q. It is a fact, is it not, that with respect to the Stadium Home Project there was an additional joint venture agreement? A. That's right.

Q. Between the same parties as I read before, that is, Macri as the first party and Goerig as the second and you the third? A. That's right.

Q. Is it a fact that except for contributions, if any, from the Stadium Home Project, there has been no contribution of cash or funds by you or by Goerig to your knowledge to the projects that I have indicated? A. That is correct.

Q. What if any equipment was furnished by you for performance of any of the work of the Roza Projects that I have indicated?

A. A 1942 G.M.C. Pick-up truck.

Q. Will you indicate with respect to that, Mr. Philp, the ownership, the manner of delivery for work on this job and the time it was on the job?

A. The truck was owned by Mr. Goerig and myself. I am unable to give the exact time without referring to the records on the length of time it was on said job.

Mr. Holman: I call on Counsel to produce the record with respect to that pick-up truck.

Mr. Brown: I have no record. [2482]

Mr. Holman: I call on Counsel Brown to supplement the deposition by such a document duly

(Deposition of Clyde Philp.)

verified by the party, to be filed supplementing this deposition. Could that be done, Mr. Philp?

The Witness: Well, off the record.

(Discussion off the record.)

Mr. Holman: Now I will ask Counsel Brown if he will do his best in cooperation with his client to furnish that information.

Mr. Brown: Yes, I will do that.

Q. (By Mr. Holman): Do you know the rental for that truck, Mr. Philp?

A. Not without referring to the records.

Q. Nor the time it was there?

A. Not at this time.

Q. And does that include the naked truck or the truck and driver?

A. It includes the truck only.

Q. And was that before or after O.P.A. maximum rental regulations, do you remember?

A. It was after the O.P.A. regulations.

Q. Can you tell me whether or not that conformed to those regulations, if you know?

A. They naturally would.

Q. You think they did, is that right?

A. I believe they did.

Q. That is the only item, Mr. Philp?

A. To the best of my knowledge.

Q. No materials furnished of any kind?

A. None that I know of.

Mr. Holman: I return the witness to you, Mr. Brown.

Mr. Brown: I have no questions.

(Deposition of Clyde Philp.)

Mr. Holman: That is all, Mr. Philp, unless you gentlemen want to ask some questions. [2483]

(Discussion off the record.)

Mr. Holman: What is the position of the Defendant Schaefer with respect to the deposition being taken; do they join with the Defendants Macri in the taking of the deposition or not?

Mr. Olson: No.

Mr. Holman: Do you wish now to take Mr. Philps' deposition?

Mr. Olson: We would be merely cross-examining. That I understand is a right we have as parties in the case.

Mr. Brown: I have no objection to cross-examination.

Mr. Holman: I haven't either. I wanted the record clear.

(Discussion off the record.)

Mr. Olson: We have no questions.

Mr. Holman: Mr. Brown, as Counsel for the Defendant and Cross-complainant, A. J. Goerig, do you now stipulate into the record that Mr. Goerig's testimony would be the same as that as given by Mr. Philp—if Mr. Goerig were here?

Mr. Brown: Yes.

Mr. Holman: That is all.

(Witness excused.)

Mr. Holman: For the purpose of the record, Mr. Brown, I am not offering Defendants' identification 1. I don't know whether you want to offer it or not.

(Deposition of Clyde Philp.)

Mr. Brown: Yes, I will offer it and will have it attached to the deposition.

Mr. Holman: There is no objection on the part of the Defendants Macri.

(Agreement terminating joint venture offered in evidence as Defendant and Cross-Complainant's Exhibit 1, the same being attached hereto and returned herewith.)

[Endorsed] Filed Feb. 24, 1947. [2484]

In the District Court of the United States for the
Eastern District of Washington, Southern Division

Civil No. 246

THE UNITED STATES OF AMERICA for
the use of M. C. SCHAEFER, an individual
doing business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, individuals
and copartners doing business as Macri Company, and CONTINENTAL CASUALTY
COMPANY, a corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it remembered, that on the 21st day of February, 1947, the above entitled cause came regularly

on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the plaintiff not appearing; the defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Bretthorst, Holman, Fowler and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the defendant Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvey, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had: [2485]

* * * * *

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * * * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness. [2486]

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

(Testimony of A. J. Goerig.)

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying [2487] is the same bank all the time, your Honor, Seattle First National Bank.

A. Oh, it was—I couldn't say; it was over a year ago, I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

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Mr. Hawkins: Mr. Goerig, will you take the stand, please?

A. J. GOERIG

recalled as a witness in his [2488] own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

* A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburgh and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? [2489] A. Yes.

(Testimony of A. J. Goerig.)

Mr. Holman: That I have no objection to. I move the rest of it be stricken.

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably a true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as copartners transacting business under the name of Goerig and Philp, and as copartners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburgh, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I [2490] don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

(Testimony of A. J. Goerig.)

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really the owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the [2491] best evidence; it is not competent evidence.

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

(Testimony of A. J. Goerig.)

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third party creditors, that is, the plaintiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore [2492] it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

(Testimony of A. J. Goerig.)

Direct Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did

Q. Did you have anything to do with those jobs?

A. No.

Q. Did Mr. Philp have anything to do with those jobs? A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No. [2493]

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with those jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

(Testimony of A. J. Goerig.)

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your attention. Where [2494] did you and Mr. Philp maintain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by plaintiff's exhibits A and B on to the completion of those jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the materialmen,

(Testimony of A. J. Goerig.)

laborers, or otherwise on those jobs that you had terminated the exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the materialmen or the plaintiffs in this case ever knew [2495] about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond signed by Macri and Company?

obligation for the performance of those jobs, to be

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it. [2496]

(Testimony of A. J. Goerig.)

Mr. Holman: May I re-state the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's exhibits A and B required and would have to have surety bonds?

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed defendant's exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the [2497] objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him

(Testimony of A. J. Goerig.)

by leading questions anyway. If you wish to open up your direct examination I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

* * * * *

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness R. M. Moorhead was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp? I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21 and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Title of District Court and Cause.]

Certificate of Clerk to Designation of Record on
Appeal of Continental Casualty Company; M. C.
Schaefer; Goerig and Philp

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages, consisting of three (3) volumes, numbered 1 to 881, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellant and Appellee, Continental Casualty Company, by the designation of record on appeal filed by counsel for the Appellee, M. C. Schaefer, and by the designation of record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same remains on file and of record in my office, and that the same constitutes the record on appeal of said Appellees and Appellants aforementioned, from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify that included in the transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants and Appellees, except Plaintiff's exhibits 1, 3, 5, 12, 22, 23, 24, 25, 26, 29, 44, 49, 51, 60, 61 and 63, Defendants Macri's exhibit 7, and Defendant Continental Casualty Company's exhibit 10. Said original exhibits are being transmitted pursuant to order of the District Court exhibits 12, 22, 23, 24, 25, 26, 29, 44, 49, 51 and 60, being sent under separate cover.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of record on appeal of the Appellant and Appellee Continental Casualty Company, amount to \$63.30, and the same has been paid in full by Eugene D. Ivy, attorney for said Appellant and Appellee.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of record on appeal of the Appellee, M. C. Schaefer, amount to \$20.70, and the same has been paid in full by Harry L. Olson, of attorneys for said Appellee.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of record on appeal of the

Appellants, A. J. Goerig and Clyde Philp, amount to \$6.30, and the same has been paid in full by Kenneth C. Hawkins, of attorneys for said Appellants.

In Witness Whereof, I Have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 11th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

[Title of Tax Court and Cause.]

Certificate of Clerk to Designation of Record on
Appeal of Sam Macri, Don Macri and Joe Macri,
and Continental Casualty Company

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages, consisting of five (5) volumes, numbered 1 to 1625, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, Sam Macri, Don Macri, and Joe Macri, and by the designation of record on appeal filed by counsel for the Appellant and Appellee, Continental Casualty Company, as the same remains on file and of record in my office, and that the same constitutes the Supplemental Record on Appeal of said Appellants and Appellees aforementioned, from the Judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify that included in the supplemental transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants and Appellees, except Plaintiff's Exhibits 4.

6, 41, 42, 43, 45, 46, 47, 48, 64, 70, 90, 123 and 129; Defendants, Macri's, Exhibits 15-a, 34, 35, 50, 50-a, 67, 74, 77, 78, 81, 82, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 and 116; Defendants, Goerig and Philp's, Exhibit 122; and Identifications 72 and 120; which are original exhibits and are being transmitted pursuant to order of the District Court. Said original exhibits and copies are being sent under separate cover.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of Record on Appeal of the Appellants, Sam Macri, Don Macri and Joe Macri, amount to \$162.40, and the same has been paid in full by Tom W. Holman, of attorneys for said Appellants.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of Record on Appeal of the Appellants and Appellees, Continental Casualty Company, amount to \$0.50, and the same has been paid in full by Eugene D. Ivy, attorney for said Appellants and Appellees.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 5th day of November, 1947.

[Seal]

A. A LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11707

CONTINENTAL CASUALTY COMPANY, a corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
use of M. C. SCHAEFER, an individual doing
business as CONCRETE CONSTRUCTION
COMPANY,

Plaintiff and Appellee.

A. J. GOERIG and CLYDE PHILP, individuals
and copartners,

Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners,

Defendants.

APPELLANT'S STATEMENT OF POINTS

Comes Now the defendant and appellant herein,
Continental Casualty Company, a corporation, and
pursuant to Rule 19 of the above entitled court

states that it will rely upon the following points in the prosecution of its appeal from the judgment herein:

1. The United States District Court erred in rendering judgment in favor of the plaintiff and against this defendant, for the reasons that the surety on a contractors payment bond, such as this defendant, is not legally liable for damages for breach of the principal contractor Macri Company in the performance of its sub-contract with the plaintiff, and there was no evidence presented segregating the items of the plaintiff's expense within and without the said sub-contract.

2. The Court erred in concluding and holding as a matter of law that under the Miller Act the surety on the contractor's payment bond is legally liable for payment of compensation to a sub-contractor on quantum meruit for labor and material furnished and the reasonable value of the work done necessitated by breach of the sub-contract by the principal contractor by delaying the job or improperly performing the same or failing to do the things required under the said sub-contract, and the court erred in rendering judgment in favor of the plaintiff against this defendant upon that basis.

3. The Court erred in denying this defendant's motion for new trial for the same reasons.

4. The Court erred in failing and refusing to hold that any amounts recoverable by the plaintiff

from the defendant Macris in excess of \$2,656.46 was without the scope of the said sub-contract and therefore not recoverable against the surety, Continental Casualty Company.

/s/ EUGENE D. IVY,

/s/ ELWOOD HUTCHESON,

Attorneys for Appellant Continental Casualty Company.

Service accepted and copy received of the foregoing Appellant's Statement of Points and Designation of Record this 14th day of August, 1947.

OLSON & PALMER,

Attorneys for use plaintiff,
M. C. Schaefer,

BROWN & HAWKINS,

Attorneys for cross appellants, Goerig and Philp.

[Endorsed]: Filed Aug. 15, 1947.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF POINTS ON APPEAL

Come now the appellants A. J. Goerig and Clyde Philp and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as errors all such matters and all adverse rulings.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for cross - appellants, Goerig and Philp.

Service Accepted and Copy Received of the foregoing Adoption of Points on Appeal this 2nd day of September, 1947.

/s/ HARRY L. OLSON,

/s/ FRED C. PALMER,

Attorneys for Appellee M. C. Schaefer.

/s/ EUGENE D. IVY,

Attorney for Appellant Continental Casualty Company.

Copy of the within Adoption of Points on Appeal served on defendants Macris by mailing a true copy thereof to Brethorst, Holman, Fowler & Dewar, 1710 Hoge Building, Seattle, Washington, on September 2, 1947.

/s/ KENNETH C. HAWKINS,

Of Brown & Hawkins, attorneys for cross - appellants, Goerig and Philp.

[Endorsed]: Filed Sept. 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL OF
APPELLANTS SAM MACRI, DON MACRI
AND JOE MACRI

Come Now the appellants Sam Macri, Don Macri and Joe Macri and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as error all such matters and all adverse rulings.

/s/ S. W. BRETHERST,
/s/ TOM W. HOLMAN,
/s/ THOMAS N. FOWLER,
/s/ WARREN L. DEWAR,

Attorneys for Appellants Sam
Macri, Don Macri and Joe
Macri.

[Endorsed]: Filed Nov. 6, 1947.